CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 64

MADELEINE URSULA SNYDER, PETITIONER,

vs.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 30, 1949.

CERTIORARI GRANTED MAY 8, 1950.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1948

No. 9847

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY, APPELLANT

vs.

MADELEINE URSULA SNYDER, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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District Court of the United States for the District of Columbia

Civil Action No. 1225–47

MADELEINE URSULA SNYDER, PLAINTIFF

vs.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY, DEFENDANT

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled action, to wit:

1 In the District Court of the United States for the District of Columbia

Civil Action No. 1225–47

MADELEINE URSULA SNYDER (MRS. CHARLES RICHARD SNYDER) BEACHWOOD, NEW JERSEY, PLAINTIFF

vs.

REAR ADMIRAL W. A. BUCK, S. C., U. S. N., PAYMASTER GENERAL OF THE NAVY, DEFENDANT

Filed March 20, 1947. Charles E. Stewart, Clerk.

Petition in the nature of mandamus to compel Paymaster General of the Navy to pay widow's allowance

Comes now the Petitioner, Madeleine Ursula Snyder (Mrs Charles Richard Snyder) by her attorneys, John Geyer Tausig, Esq., and Gibbs L. Baker, Esq., and states:

1. This Honorable Court has jurisdiction over the matter here in controversy and the power to act as requested by Petitioner by reason of the provisions of the Act of May 22, 1938, C. 685, as amended, U. S. C. A. Title 34, Sec. 943, the Act of March 3, 1887, C. 359, Secs. 1, 2, as amended, U. S. C. A. Title 28, Sec. 41, Subsection 20, Act of June 11, 1946, C. 324, Sec. 10, U. S. C. A. Title 5, Sec. 1009, and the Rules of Civil Federal Procedure, particularly Rule 81 (b).

2. By a valid ceremonial marriage entered into at Elkton, Maryland, on July 3, 1945, Petitioner became the lawful wife of Charles Richard Snyder, and continued to live with him from that date and to be his lawful wife until he died intestate on March 10, 1946, at Westfield, New Jersey.

3. At the time of his death, Charles Richard Snyder was a Chief Pay Clerk, United States Navy, receiving pay at the rate of $2,800 per annum.

2 4. On November 12, 1946, the Orphans' Court of Ocean County, New Jersey, granted the Petitioner Letters of Administration on the Estate of Charles R. Snyder, first having found that Petitioner was decedent's widow and as such was entitled to prior right, over the decedent's sister, Dorothy Helen Reul, to the administration thereof. Said letters are in full force and effect and unrevoked.

5. The Paymaster General of the Navy, having been officially notified of the death of Charles Richard Snyder, Chief Pay Clerk, United States Navy, from wounds or disease, not the result of his own misconduct, did not cause to be paid to the Petitioner, decedent's widow, an amount ($1,400) equal to six months' gratuity pay at the rate received by the decedent on the date of his death. The provisions of the Act of May 22, 1928, C. 685, as amended, U. S. C. A. Title 34, Sec. 943, do not permit the Paymaster General any discretion in this connection but direct him to pay this gratuity to the decedent's widow. Not having received this payment the Petitioner made claim for the same, which claim was disallowed by the Chief of Navy Personnel, Navy Department, Washington, D. C. The claim was disallowed on the ground that Petitioner had not been decedent's lawful wife and is not his widow. There is no statute which precludes judicial review of this agency's decision.

Wherefore, the Petitioner requests this Honorable Court to find that the Petitioner was Charles Richard Snyder's lawful wife and is his widow and thereupon to Order the Paymaster General of the Navy to pay Petitioner an amount equal to six months' gratuity pay at the rate received by decedent, Charles Richard Snyder, Chief Pay Clerk, United States Navy, on the date of his death.

Madeleine Ursula Snyder.
MADELEINE URSULA SNYDER.
(Mrs. CHARLES RICHARD SNYDER.)

3 John Geyer Tausig,
JOHN GEYER TAUSIG,
Gibbs L. Baker,
GIBBS L. BAKER,
Attorneys for Plaintiff,
1011 Investment Building, Washington 5, D. C.

STATE OF NEW JERSEY,
County of Ocean, ss:

Madeleine Ursula Snyder (Mrs. Charles Richard Snyder) being duly sworn on oath deposes and says that she has read the foregoing Petition and that facts therein stated she believes to be true.

MADELEINE URSULA SNYDER.

Subscribed and sworn to before me this 24th day of January 1947.

Lillian L. Ricker,
LILLIAN L. RICKER,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Ocean, ss;

I, John A. Ernest, Clerk of the said County of Ocean and also Clerk of the Court of Common Pleas in and for said County (said Court being a Court of record), do hereby certify that Lillian L. Ricker, before whom the foregoing affidavit, proof or acknowledgment was made, is and was at the time of taking the same a Notary Public of said State, dwelling in said County commissioned and sworn, and duly authorized by the laws of this State to take and certify depositions; to administer oaths and affirmations; to take affidavits for general purposes; to take and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments lying in said State of New Jersey and to be recorded therein, and further that I am well acquainted with the handwriting of said Notary Public and verily believe the signature to said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the said Court and County at Toms River, New Jersey, this 29th day of January A. D. 1947.

JOHN A. ERNST,
Clerk.
By LEROY GRANT,
Deputy Clerk.

4 In the District Court of the United States
for the District of Columbia

Civil Action No. 1225–47

MADELEINE URSULA SNYDER (MRS. CHARLES RICHARD SNYDER),
PLAINTIFF

v.

REAR ADMIRAL W. A. BUCK, SC, USN, PAYMASTER GENERAL
DEFENDANT

Filed June 11, 1947. Charles E. Stewart, Clerk.

Answer

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

The court is without jurisdiction because the suit is in substance an action against the United States, which has not consented to be sued for six months' gratuity pay, and the relief prayed for constitutes an interference with the action of the Navy Department done pursuant to law.

THIRD DEFENSE

The Navy Department, pursuant to statutory authority, determined, upon the evidence, that the plaintiff was not the lawful widow of Charles Richard Snyder; that a former marriage of the plaintiff had not been terminated by a Mexican divorce; and that she was not entitled to the six months' death gratuity under the statute, so that a case for an extraordinary legal remedy such as mandamus or its equivalent is not made out.

FOURTH DEFENSE

1. Defendant denies the allegations of paragraph 1.

2. Defendant denies the allegations of paragraph 2.

5 3. Defendant admits the allegations of this paragraph, except that the rate of pay was $2,730 per annum instead of $2,800, as alleged.

4. Defendant denies the allegations of this paragraph for want of information and belief.

5. Defendant denies the allegations of this paragraph in the manner and form alleged. Further answering, defendant avers that the Navy Department, having been officially notified of the death of Charles Richard Snyder, Chief Pay Clerk, United States Navy, and having determined that his death from wounds or disease was not the result of his own misconduct, did not cause to be paid to the petitioner an amount ($1,365) equal to the six months' death gratuity at the rate received by the decedent on the date of his death, determining that she was not the decedent's widow; that a Mexican divorce which she had obtained from a former husband was invalid; that under the statute the six months' death gratuity was payable to a sister of the said Charles Richard Snyder; and that the claim of the petitioner should be disallowed.

Wherefore, defendant prays that the complaint be dismissed, with costs.

George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney,
D. Vance Swann,
D. VANCE SWANN,
Attorney, Department of Justice,
Thomas E. Walsh,
THOMAS E. WALSH,
Attorney, Department of Justice,
Attorneys for Defendant.

Service is this 10th day of June 1947, being had upon the attorneys for the plaintiff by depositing in the mail a copy of the answer to Mr. John Geyer Tausig, Investment Building, Washington, D. C.

Thomas E. Walsh,
THOMAS E. WALSH,
Attorney, Department of Justice.

6 In the District Court of the United States for the District of Columbia

Civil Action No. 1225–47

MADELEINE URSULA SNYDER (MRS. CHARLES RICHARD SNYDER), PLAINTIFF

vs.

REAR ADMIRAL W. A. BUCK, S. C., U. S. N., PAYMASTER GENERAL OF THE NAVY, DEFENDANT

Filed December 9, 1947. Harry M. Hull, Clerk.

Commissioner's report upon the issues raised by the pleadings and the stipulated facts

STATEMENT OF CASE

Plaintiff's petition, as filed March 20, 1947, named the United States as defendant, but was entitled "Petition in the Nature of Mandamus to compel Paymaster General of the Navy to pay Widow's Allowance," and service of process was made upon said official.

Such being the case, counsel for the Government consented to the substitution of the Paymaster General of the Navy for the United States as defendant, and, with your Commissioner's approval, the petition was amended accordingly by interlineation.

Plaintiff predicates her right to the "widow's allowance" claimed upon the Act of Congress of June 4, 1920, as amended May 22, 1928, c. 685, and later.

As so amended, said statute appears as Section 943 of Title 34 of the U. S. Code, which reads:

"SEC. 943. ALLOWANCE ON DEATH OF OFFICER OR ENLISTED MAN OR NURSE, TO WIDOW, CHILD, OR DEPENDENT RELATIVE

"Immediately upon official notification of the death from wounds or disease, not the result of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of
7 the Regular Navy or Regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow, to the child or children and if there be no widow or child, to any other dependent relative of such officer, enlisted man, or nurse, previously designated by him or her, an amount equal to six months' pay at the rate received by such officer, enlisted man, or nurse at the date of his or her death. The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. Said amount shall be paid from funds appropriated for the pay of the Navy and pay of the Marine Corps, respectively: Provided, That if there be no widow, child, or previously designated dependent relative, the Secretary of the Navy shall cause the amount herein provided to be paid to any grandchild, parent, brother or sister, or grandparent shown to have been dependent upon such officer, enlisted man, or nurse prior to his or her death, and the determination of such fact by the Secretary of the Navy shall

be final and conclusive upon the accounting officers of the Government: * * *

"In support of her claim, plaintiff states in her petition:

"2. By a valid ceremonial marriage entered into at Elkton, Maryland, on July 3, 1945, Petitioner became the lawful wife of Charles Richard Snyder, and continued to live with him from that date and to be his lawful wife until he died intestate on March 10, 1946, at Westfield, New Jersey.

3. At the time of his death, Charles Richard Snyder was a Chief Pay Clerk, United States Navy, receiving pay at the rate of $2,800 per annum.

"4. On November 12, 1946, the Orphans' Court of Ocean County, New Jersey, granted the Petitioner Letters of Administration on the Estate of Charles R. Snyder, first having found that Petitioner was decedent's widow and as such was entitled to prior right, over the decedent's sister, Dorothy Helen Reul, to the administration thereof. Said letters are in full force and effect and unrevoked.

"The petition further states:

"5. The Paymaster General of the Navy, having been officially notified of the death of Charles Richard Snyder, Chief Pay Clerk, United States Navy, from wounds or disease, not the result of his own misconduct, did not cause to be paid to the Petitioner, decedent's widow, an amount ($1,400) equal to six months' gratuity pay at the rate received by the decedent on the date of his death. The provisions of the Act of May 22, 1928, C. 685, as amended, U. S. C. A., Title 34, Sec. 943, do not permit the Paymaster General any discretion in this connection but direct him to pay this gratuity to the decedent's widow. Not having received this payment the Petitioner made claim for the same, which claim was disallowed by the Chief of Navy Personnel, Navy Department, Washington, D. C. The claim was disallowed on the ground that Petitioner had not been decedent's lawful wife and is not his widow. There is no statute which precludes judicial review of this agency's decision."

8 Defendant filed a motion to dismiss the petition, based upon jurisdictional and other grounds.

Before any action on said motion by your Commissioner or the Court, defendant filed an answer to the petition.

Said answer alleges, in substance, that the complaint fails to state an action upon which relief can be granted; that the Court is without jurisdiction of this suit because it amounts to an action against the United States, which had not consented to be so sued; that the relief prayed would constitute an interference with the action of the Navy Department taken pursuant

to law; and, finally, that the plaintiff was not the lawful widow of Charles Richard Snyder, since the former marriage of plaintiff to one James John Ford had been terminated by a Mexican divorce, which was invalid.

A stipulation as to the facts involved in this case has been entered into by counsel and is being filed with this report.

Commissioner's opinion

I

AS TO THE JURISDICTION OF THE COURT

In my judgment the Court has authority to entertain this suit, and grant plaintiff the relief prayed, if the stipulated facts warrant such action.

It is clear from a reading of Section 943 of Title 34 of the U. S. Code that, so far as the widow or child of an officer or enlisted man of the Regular Navy or Regular Marine Corps is concerned, the duty of the Paymaster General of the Navy, when officially notified of the death of such officer or enlisted man, immediately to pay said widow or child the amount specified in the statute, is entirely ministerial, and not subject in any wise to said official's discretion.

9 It is only when the deceased officer or enlisted man has left no widow or child, and has failed to designate some other dependent relative to receive the specified amount, that the Paymaster General is given authority to determine whether there is some dependent relative, within the group specified, to whom the money may be paid; and it is the decision of the Paymaster General in such case only that is made final upon the accounting officers of the Government.

It is true that, where the right to receive a certain benefit or service authorized by Congress is not clear, mandamus is not available to review the decision of an administrative officer in regard to such matter.

U. S. ex rel. Chicago, etc. R. R. Co. v. Interstate Commerce Commission, 294 U. S. 50

But where, as here, the petition presents a case where the facts as to the matter involved are undisputed, and the only conclusion properly to be drawn therefrom is one favorable to the petitioner, or the law has been misconstrued, or where the action of the executive officer in said matter was arbitrary or capricious, the court has jurisdiction to review said decision and protect the rights of the petitioner.

Silberschein v. United States, 266 U. S. 221, 225

In Roberts v. United States, 176 U. S. 221, it was decided that the duty of the Treasurer of the United States to pay the sum involved was ministerial in its nature; therefore mandamus was the proper remedy for his failure to perform said duty.

It is true the "widow's allowance" here involved is a gratuity, and being a gratuity, Congress might have made the determination of the Paymaster General of the Navy as to the right thereto of anyone claiming to be the widow of an officer or enlisted man in the Navy, final and conclusive upon the Courts, as Congress has done with respect to the decisions of the Administrator of Veterans Affairs dealing with compensation and other benefits granted veterans.

Lynch v. United States, 292 U. S. 571, 578. Van Horne v. Hines (App. D. C.), 122 Fed. 2d 207; Certiorari denied 314 U. S. 689

But the statute involved in the present case contains no such provision with respect to the decisions of the Paymaster General of the Navy.

Furthermore, defendant's contention that the Court is without jurisdiction to review the decision of the Paymaster General of the Navy in regard to the widow's allowance is in conflict with the provisions of the Administrative Procedure Act, approved by Congress June 11, 1946 (60 U. S. Stats. 237, 243), which, under the head "Judicial Review," provides:

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) *Form and venue of action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *"

II

AS TO THE MERITS OF THE CASE

This is a companion case to C. A. 1346–47, where plaintiff is suing the United States as beneficiary of two contracts of

National Service life insurance granted her husband, Charles Richard Snyder, whose sister, Dorothy Helen Ruel, was made third-party defendant.

In my report on that case, filed November 14, 1947, I expressed the view that the Court should not, under the circumstances of said case, permit the defendants to make a collateral attack on the ceremonial marriage entered into
11 by plaintiff with Snyder at Elkton, Maryland, on July 3, 1945, based upon the invalidity of the Mexican divorce secured by plaintiff from her former husband, James John Ford, since her marriage to Snyder was presumptively valid, and no good purpose would be served by permitting such an attack.

The facts bearing upon plaintiff's divorce in Mexico from her first husband and her subsequent marriage to Charles Richard Snyder have also been stipulated in this case, the stipulations in each case being practically identical in respect to said proceedings.

However, there are some differences between the claim presented in this case and that presented in Civil Action 1346–47.

In C. A. 1346–47 plaintiff is suing on two paid-up contracts of National Service life insurance granted Charles Richard Snyder, while in the present case plaintiff is seeking an amount directed by Congress to be paid by the Paymaster General of the Navy to the widow of an officer or enlisted man of the Regular Navy, or Regular Marine Corps, upon being notified of the death of such officer or enlisted man from wounds or diseases, not the result of his own misconduct.

In other words, in C. A. 1346–47, property of Charles Richard Snyder is involved, while in this case a gratuity granted by the United States is the subject- matter of plaintiff's suit.

Furthermore, in C. A. 1346–47 the plaintiff, as beneficiary of the insurance contract, was authorized by the legislation of Congress to sue the United States on said contract in the event of a disagreement with the Bureau as to her claim; whereas in this case claimant is seeking a mandatory injunction against the Paymaster General, the granting of which lies in the discretion of the Court.

Notwithstanding said differences, however, the fundamental question in both cases is whether the Court, under the circumstances disclosed by the stipulated facts, should permit a collateral attack to be made by the respective defendants upon the validity of plaintiff's marriage to Charles Richard Snyder.

12 In my judgment, if such an attack should not be allowed in one of these cases, it ought not to be allowed in the other.

In other words, it would be inconsistent for the Court to hold, in effect, that the plaintiff was to be regarded as having been the lawful wife of Charles Richard Snyder for the purpose of his insurance, but was not to be so regarded for the purpose of the money granted by Congress for the protection of his widow.

It is also to be noted that the statute involved in this case requires the widow's allowance to be paid by the Paymaster General of the Navy "immediately" upon receiving notification of the serviceman's death, if he was not at fault, as it is stipulated in this case he was not.

Manifestly, the direction of Congress for the immediate payment of such allowance will be defeated if the Paymaster General is permitted to attack the validity of Charles Richard Snyder's open, ceremonial marriage to plaintiff, notwithstanding the legal presumption that such a marriage is valid, and that collateral attacks are not favored unless some good purpose is to be served thereby.

III

There is another matter bearing upon the questions presented in these two cases to which I wish to refer.

It appears from the stipulated facts in each case that Charles Richard Snyder, in his application to the Clerk of the Maryland court for a license to marry the plaintiff, stated in said application, in answer to the question whether either party to the proposed marriage had been divorced, that plaintiff had been divorced "in New York, N. Y.," on May 2, 1945.

This misstatement as to the place where the divorce was granted was noted by me when considering Civil Action 1346–47, and it was my intention, when preparing my report on said case, to refer to said matter. That I did not do so was due partly to the fact that neither counsel for the United States nor the attorney for the sister of the insured, in their briefs and oral arguments before me, made any point of said matter. Furthermore, I thought said misstatement might have been due to some misunderstanding on the part of Charles Richard Snyder, who was dead, and therefore could not explain it.

Recently, I was advised by Mr. Tausig, plaintiff's attorney in both of these cases, that when he took this case he had been informed by plaintiff that when she and Mr. Snyder applied for said marriage license, they had advised the Clerk of the Maryland court that plaintiff had obtained her divorce in Mexico through a firm of attorneys in New York, but in writing down said answer the Clerk, while stating the date of said divorce

correctly, had erroneously written "New York, N. Y.," instead of Mexico, as the place where the divorce was obtained.

Mr. Tausig has also advised me that he will have the plaintiff (now in San Francisco) present in Court when these cases are heard, so that she may testify as to what occurred at the time said application for a license to marry was made to the Clerk of the Maryland Court.

CONCLUSION

In my opinion the Court should defer final action in both of these cases pending the testimony of the plaintiff as to what occurred when said application for a marriage license was made to the Clerk of the Maryland court.

If said matter is cleared up, I think plaintiff should be accorded the relief prayed in each case.

The briefs submitted to me by counsel for the respective parties are also being filed with this report.

Respectfully submitted.

William R. Harr,
WILLIAM R. HARR,
Commissioner of Veterans Cases.

cc: Mr. JOHN G. TAUSIG,
Attorney for Plaintiff.
Mr. D. VANCE SWANN,
Attorney, Department of Justice,
for the United States.

14 In the District Court of the United States
for the District of Columbia

Civil Action No. 1225–47

MADELEINE URSULA SNYDER (MRS. CHARLES RICHARD SNYDER),
PLAINTIFF

v.

REAR ADMIRAL W. A. BUCK (S. C. U. S. N.) PAYMASTER GENERAL OF THE NAVY, DEFENDANT

Filed December 9, 1947. Harry M. Hull, Clerk.

Stipulation of facts

It is hereby stipulated by and between counsel for the respective parties hereto as follows:

1. That on October 4, 1937, Madeleine Ursula Bradley and

James John Ford were married in Lansdowne, Pennsylvania, by the Rev. Father Joseph McGrory, a Catholic Priest.

2. That thereafter the said Madeleine Ursula Ford and James John Ford lived together as husband and wife in divers places in the state of New Jersey until November 15, 1944, upon which date they were separated and did not live together at any time thereafter. The said Madeleine Ursula Ford continued to reside in the state of New Jersey and the said James John Ford removed to the state of Florida, where he continued to reside until about May 1, 1945.

3. That on the 26th day of April 1945, the said Mrs. Madeleine Ursula Ford then being a resident of the state of New Jersey, United States of America, appearing through an attorney in the Republic of Mexico, filed a petition for divorce from the said James John Ford in the First Civil Court of The Bravos District, State of Chihuahua, Republic of Mexico.

4. That on the 26th day of April 1945, James John Ford, then resident of the state of Florida, appearing through an attorney in the Republic of Mexico, filed an answer to said petition of divorce in the First Civil Court of The Bravos District, State of Chihuahua, Republic of Mexico, praying that a decree of divorce be granted.

15 5. That on the 27th day of April 1945 the cause came on to be heard and on May 2, 1945, a judgment, copies of which are hereto attached marked Exhibit 1, one of which is in Spanish and the other the English translation thereof, the same being a true copy of the original, was entered in the First Civil Court of The Bravos District, State of Chihuahua, Republic of Mexico, stating that the marital contract between the said Madeleine Ursula Ford and James John Ford was thereby dissolved.

6. That the said Madeleine Ursula Ford was neither a resident of nor domiciled in the Republic of Mexico at or prior to the filing of the petition for divorce or the entry of the aforesaid decree.

7. That the said James John Ford was neither a resident of, nor domiciled in the Republic of Mexico at or prior to the filing of the petition for divorce or the entry of the aforesaid decree.

8. That all negotiations leading up to the filing of the petition, the answer and the entry of the decree of the said court in the Republic of Mexico were handled through correspondence with attorneys in the Republic of Mexico.

9. That on July 3, 1945, Charles Richard Snyder, a resident of Westfield, New Jersey, United States of America, and the said Madeleine Bradley Ford, a resident of Beechwood, New Jersey, United States of America, participated in a marriage

ceremony performed by the Rev. R. J. Sturgill, Baptist minister, at Elkton, state of Maryland, United States of America. A copy of the application for license for marriage and marriage certificate are hereto attached and marked Exhibit 2.

10. That thereafter the said Charles Richard Snyder and Madeleine Bradley Ford lived together in the state of New Jersey until March 10, 1946, when the said Charles Richard Snyder died.

11. That on July 3, 1945, when the ceremonial marriage of Madeleine Bradley Ford and Charles Richard Snyder was performed, James John Ford who had married Madeleine Ursula Bradley (Madeleine Bradley Ford) on October 4, 1937, at Lansdowne, Pennsylvania, was alive and he was still living at the time of the death of Charles Richard Snyder on March 10, 1946.

12. At the time of his death, Charles Richard Snyder was serving as a Chief Pay Clerk, United States Navy. His death, due to an automobile accident, was held by the Judge Advocate General of the Navy to have occurred not as the result of his own misconduct. On April 25, 1946, Madeleine Ursula Snyder filed an application for death gratuity and on May 9, 1946, a claim for the arrears of pay due the deceased, Charles Richard Snyder, with the Casualty Section of the Bureau of Naval Personnel, Navy Department. Upon investigation the Bureau of Naval Personnel found that the divorce decree dissolving the plaintiff's first marriage was obtained through attorneys in Mexico without personal appearance in Mexico of either the plaintiff or her first husband, James John Ford, and refused to recognize the divorce decree or the validity of the subsequent marriage of the plaintiff to Charles Richard Snyder. (See attached copy of letter dated June 26, 1947, from the Bureau of Naval Personnel.) The plaintiff's claim for the arrears of pay and six months' death gratuity was disallowed by the Dependents Welfare Division, Bureau of Naval Personnel and she was notified of the disallowance by letter dated August 23, 1946.

13. The complaint in this action was filed on March 20, 1947, and service was acknowledged by the Navy Department on March 24, 1947.

14. According to information supplied by the Navy Department, on March 17, 1947, the Director, Dependents Welfare Division, Bureau of Naval Personnel, certified to the Chief of Field Branch, Bureau of Supplies and Accounts, Navy Department, Cleveland, Ohio; the name of Mrs. Dorothy H. Reul, dependent sister of the deceased Charles Richard Snyder as the proper beneficiary for payment of the six months'

death gratuity. The Navy Department stated that this certification was pursuant to authority contained in Section 10 of Public Law 490, 77th Congress, as amended July 1, 1944, and the delegation thereof in Secretary of the Navy letter of September 1, 1944. (Title 50, U. S. C. A. War Appendix. September 1, 1944. (Title 50, U. S. C. A. War Appendix, Reul of the death gratuity in the amount of $1365 was made by U. S. Treasury check No. 244290 dated April 2, 1947.

15. That Madeleine Ursula Bradley, Madeleine Bradley Ford, and Madeleine Bradley Snyder are one and the same person.

John Geyer Tausig,
JOHN GEYER TAUSIG,
Attorney for Plaintiff,
George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney,
D. Vance Swann,
D. VANCE SWANN,
Attorney, Department of Justice,
William C. Brewer,
WILLIAM C. BREWER,
Attorney, Department of Justice,
Attorneys for Defendant.

18 EXHIBIT 1.

Filed December 9, 1947. Harry M. Hull, Clerk.

ESTEBAN BRIONES MARTINEZ, CLERK OF THE FIRST CIVIL COURT OF THE BRAVOS DISTRICT, STATE OF CHIHUAHUA, REPUBLIC OF MEXICO, CERTIFIES: That in the suit for necessary divorce filed by Attorney at Law, Jose Amador y Trias, as legal representative of MRS. MADELEINE BRADLEY FORD (MADELINE V. BRADLEY) against MR. JAMES JOHN FORD, there are the following resolutions:

JUDGMENT: City of Juarez, Chihuahua, on the Twenty-Seventh day of April of Nineteen Hundred Forty-Five. WHEREAS, came on to be finally decieded as to the suit for necessary divorce filed by Attorney at Law, Jose Amador y Trias, as legal representative of MRS. MADELEINE BRADLEY FORD (MADELINE V. BRADLEY) against MR. JAMES JOHN FORD (File 1098/945); and it, APPEARING: That through a pleading dated in this City on the Twenty-Sixth Instant, Attorney at Law, Jose Amador y Trias, with the

aforesaid representation and expressly submitting his client to the jurisdiction of this Court, filed suit for necessary divorce against her husband, MR. JAMES JOHN FORD, alleging as grounds for the action, the incompatibility of temperaments, stating: That their marriage was performed on the Fourth day of October of Nineteen Hundred Thirty-Seven, at Lansdowne, Pennsylvania, United States of America, as shown by the marriage certificate presented with its translation to the Spanish; that of said marriage there are no children nor community properties to be divided. WHEREAS, the complaint was docketed; ordering that the party defendant, MR. JAMES JOHN FORD, be served and summoned; and WHEREAS, through a writing of the said Twenty-Sixth Instant, Attorney at Law, Lupercio Garza Ramos, as legal representative of said party, answered in his name and stead, the complaint filed against him, confessing and acknowledging it throughout all of its parts and praying that this final judgment be dictated; all the requirements of Law being fulfilled, including payment for the publication of same; and CONSIDERING: That
19 this Court is competent to adjudge in the present case, as provided by Article 23 of the Law of Divorce; that as required by Article 28 of the said Law, the marriage certificate of the parties was presented with its translation to the Spanish. That as grounds for the action, the party plaintiff alleged the incompatibility of temperaments, provided by subsection XIX of Article 3 of the Law of Divorce and the complaint being confessed and acknowledged throughout all of its parts by the party defendant the grounds alleged, were thereby fully proven as required by Article 370 of the Code of Civil Procedures. That it appearing from the complaint that there are no children issue of the marriage nor community properties to be divided, no decisions are required thereto. WHEREAS, in view of the above and basing same furthermore on Articles 1, 2, 10, 43, 44 and 45 of the Law of Divorce, it is decreed: FIRST: That there is decreed, with all its legal consequences, the dissolution of the marriage entered into by JAMES JOHN FORD and MADELEINE BRADLEY FORD (MADELINE V. BRADLEY) on the Fourth day of October of Nineteen Hundred Thirty-Seven, at Lansdowne, Pennsylvania, United States of America, leaving both parties free and in legal aptitude to contract new marriage ties. SECOND: That the party plaintiff recovers her maiden name. THIRD: Let this resolution be registered and published, giving to the interested parties the certified copies of same requested and in due time, let these proceedings be filed. So definitely ad-

judged, ruled, and signed, Attorney at Law, Xavier Rosas Cevallos, Judge of the First Civil Court of the Bravos District. I certify. Xavier Rosas. Esteban Briones Martinez. Rubrics.

CERTIFICATION: The undersigned Clerk, CERTIFIES: That during the twenty-four hours following the notification of the above judgment, no action was filed against same and it was thereby declared a final decree, as provided by Article 39 of the Law of Divorce. City of Juarez, Bravos District, State of Chihuahua, on the Second day of May of Nineteen Hundred Forty-Five. I certify. (Twelve hours.) Esteban Briones Martinez.

20 Affidavit: On the Second day of May of Nineteen Hundred Forty-Five, the undersigned Clerk, CERTIFIES: That the receipt number 72810 of the Twenty-Seventh day of April of the current year, shown in this suit and issued by the Tax Collector's Office of this City, in the amount of $143.75 (One Hundred and Forty-Three pesos and 75/100) has been separated from its file and forwarded, together with a certified copy of the final decree, to the Editor of the Official Periodical of the State, for its publication. Witnesseth. Esteban Briones Martinez—Rubric.

THIS IS A TRUE AND EXACT COPY OF ITS ORIGINAL ISSUED IN THESE TWO LEGAL SHEETS FOR THE PARTY PLAINTIFF AND BEING DULY COMPARED AND CORRECTED IS AUTHORIZED IN DUE FORM IN THE CITY OF JUAREZ, CHIHUAHUA, MEXICO, ON THE SECOND DAY OF MAY OF NINETEEN HUNDRED FORTY-FIVE. I CERTIFY.

(Signed) ESTEBAN BRIONES MARTINEZ,
The Clerk.

I certify as to the genuineness of the persons, signatures and records hereto:

(Signed) XAVIER ROSAS CEVALLOS,
The Judge of the First Civil Court.

The validity of this copy shall be held void upon having any erasure, repair of interlining made on it.

(Seal of the Government of the State of Chihuahua.)

The Governor of the State of Chihuahua, CERTIFIES: That the signatures of Attorney at Law, XAVIER ROSAS CEVALLOS and of ESTEBAN BRIONES MARTINEZ, are authentic as they appear in the above document, a final decree of divorce, and that said parties were, at the time of signing

same, the Judge and Clerk, respectively, of the First Civil Court of the Bravos District, of this State.

Chihuahua, May 7th, 1945.

(Signed) ESTEBAN URANGA,
The Secretary of the State.

(Signed) FERNANDO FOGLIO MIRAMONTES,
The Constitutional Governor.

On the margin: Seals and stamps of the Government.

21 El Ciudadano Esteban Briones Martínez, Secretario del Juzga do Primero de lo Civil del Distrito Bravos, Estado de Chihuahua, Repúblic Mexicana, certifica: Que en el juicio de divorcio necesario promovido por el señor Licenciado José Amador y Trias como apoderado jurídico de la señora Madeleine Bradley Ford (Madeline V. Bradley) en contra del señor James John Ford, obran lâs constancias siguientes:

Resolución. Ciudad Juárez, Chihuahua, a 27 veintisiete de abril de 1945 mil novecientos cuarenta y cinco. Visto para resolver en definitiva el juicio de divorcio necesario promovido por el señor Licenciado José Amador y Trias como apoderado jurídico de la señora Madeleine Bradley Ford (Madeline V. Bradley), en contra del señor James John Ford (Expediente 1098/945) y, resultando: Por escrito fechado en esta Ciudad el dia veintiseis de los corrientes, el señor Licenciado José Amador y Trias con la personalidad indicada y sometiendo expresamente a su mandante a la jurisdicción de este Juzgado, promovió juicio de divorcio necesario en contra del esposo de aquella, señor James John Ford alegando como causa la incompatibilidad de caracteres y exponiendo: Que el matrimonio fué contraído el dia 4 cuatro de octubre de 1937 mil novecientos treinta y siete en Lansdowne, Pennsylvania, Estados Unidos de Norte América, como consta del certificado respectivo que se acompañó con su traducción al castellano; que de dicho matrimonio no existen hijos ni hay bienes comunes que dividir. Se dió entrada a la demanda mandándose correr el traslado respectivo al demando señor James John Ford; y por escrito fechado el dia veintiseis del actual, el señor Licenciado
22 Lupercio Garza Ramos como apoderado jurídico de dicho señor contestó a nombre de él la demanda entablada en su contra confesándola en todas sus partes y pidiendo la resolución que hoy se dicta en atención a que se han satisfecho todos los requisitos legales inclusive el del pago de la publicación de la misma; y, considerando: Es competente este Juzgado para resolver en el presente caso de acuerdo con lo dispuesto por el artículo 23 de la Ley del Divorcio y de conformidad con el

artículo 28 de la propia Ley se acompañó el correspondiente certificado de matrimonio de las partes con su traducción al castellano. Como causa de divorcio señaló la actora la incompatibilidad de caracteres, causal prevista en la fracción XIX del artículo 3°. de la citada Ley del Divorcio y al confesarse la demanda en todas sus partes quedó plenamente probada de acuerdo con el artículo 370 del Código de Procedimientos Civiles aplicado supletoriamente. Habiéndose manifestado en la demanda que del matrimonio no existen hijos ni hay bienes comunes que dividir, nada hay que resolverse en esta sentencia sobre esos particulares. Por lo expuesto y con apoyo además en los artículos 1, 2, 10, 43, 44 y 45 de la Ley del Divorcio invocada, se falla: Primero. Se declara disuelto con todas sus consecuencias legales, el matrimonio contraído por James John Ford con Madeleine Bradley Ford (Madeline V. Bradley), el día 4 cuatro de octubre de 1937 mil novecientos treinta y siete en Lansdowne, Pennsylvania, Estados Unidos de Norte América, quedando ambas partes en aptitud legal de contraer nuevas nupcias. Segundo. Se restituye a la actora su nombre de soltera. Tercero. Regístrese la presente resolución,
23 publíquese, dense a los interesados las copias certificadas que soliciten y en su oportunidad archívanse los autos. Así definitivamente juzgando lo sentenció y firma el C. Licenciado Xavier Rosas Cevallos, Juez Primero de lo Civil del Distrito Bravos. Doy fe. Xavier Rosas. Esteban Briones Martínez. Rúbricas.

Certificacion. El subscrito Secretaro certifica: Que durante las veinticuatro horas siguientes a la notificación de la sentencia que antecede, no se interpuso contra la misma recurso alguno y en consecuencia ha causado ejecutoria conforme al artículo 39 de la Ley del Divorcio. Ciudad Juárez, Distrito Bravos, Estado de Chihuahua, a los dos dias del mes de mayo de mil novecientos cuarenta y cinco (doce horas). Doy fé. Esteban Briones Martínez. Rúbrica.

Constancia. En dos de mayo de mil novecientos cuarenta y cinco, el subscrito Secretario hace constar: Que el certificado de pago número 72810 de fechado veintisiete de abril próximo pasado, exhibido en este juicio y expedido por la Recaudación de Rentas de esta Ciudad por la cantida de $143.75 ciento cuarenta y tres pesos setenta y cinco centavos se desglosa para remitirse juntamente con una copia certificada de la parte conductente de la sentencia dictada en este mismo juicio el C. Director del Periódico Oficial del Estado para su publicación. Conste. Esteban Briones Martínez. Rúbrica.

Es copia fiel y exacta de sus originales, que en estas
24 dos fojas útiles se expide para la actora, y debidamente

cotejada se autoriza en forma en Ciudad Juarez, Chihuahua, Mexico, a las dos dias del mes de mayo de mil novecientos cuarenta y cinco. Doy fe.

El Secretario—

Esteban Briones Martínez.
ESTEBAN BRIONES MARTÍNEZ.

[SEAL] Vo. Bo. El Juez Primero de lo Civil—

Xávier Rosas.
LIC. XAVIER ROSAS CEVALLOS.

La validez de esta copia queda nulificada con cualquier raspadura, enmienda o entrerrenglonadura que contenga.

[SEAL] Poder Ejecutivo.

El Gobernador del Estado de Chihuahua, certifica la autenticidad de la(s) firma(s) de los Ciudadanos Licenciado Xavier Rosas Cevallos y Esteban Briones Martínez, Juez y Secretario, respectivamente, del Juzgado Primero de lo Civil del Distrito Bravos, de este Estado en la fecha en que autorizó (autorizaron) el present documento.

Chihuahua, a 7 de mayo de 1945.

EL GOBERNADOR CONSTL.
Ing. Fernando Foglio Miramontes.
EL SRIO. GRAL. DE GBNO.
Ing. Esteban Uranga.

(Stamps.)

25 STATE OF TEXAS,
County of El Paso, ss:

AFFIDAVIT

Berta Martinez, being duly sworn on her oath, deposes and says:

That she has good and sufficient knowledge of both the English and the Spanish languages and that she has had years of experience in making translations of legal documents, from the Spanish to the English and vice versa and that the foregoing translation, taken from the first certified copy of the final decree of divorce rendered in the suit of: Madeleine Bradley Ford (Madeline V. Bradley) vs. James John Ford by the First Civil Court of the Bravos District, State of Chihuahua, Mexico, on the 2nd day of May of 1945, is true and correct.

BERTA MARTINEZ.
Berta Martinez.

Submit proposed fiindings and conclusions of law and proposed form of judgment.

ALEXANDER HOLTZOFF,
Associate Justice.

JANUARY 22, 1948.

50 In the District Court of the United States for the District of Columbia

Civil Action No. 1225-47

MADELEINE URSULA SNYDER, PLAINTIFF

v.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY, DEFENDANT

Filed January 20, 1948. Harry M. Hull, Clerk.

Findings of fact and conclusions of law

This cause came on for trial before the undersigned judge of the United States District Court for the District of Columbia, on the 14th day of January 1948, a trial by jury not having been demanded by the parties and therefore having been waived under the Federal Rules of Civil Procedure; and the Court having considered the pleadings, the stipulation of the parties, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of laws.

FINDINGS OF FACT

I

On March 10, 1946, Charles R. Snyder, Chief Pay Clerk, United States Navy, died. His death was held by the Judge Advocate General of the Navy to have been caused by wounds or disease, not the result of the deceased's own misconduct, and the Judge Advocate General so notified the Paymaster General of the Navy.

II

That on April 25, 1946, Madeleine Ursula Snyder filed an application with the Casualty Section of the Bureau of Naval Personnel, Navy Department, Washington, D. C., for the death gratuity payable to her as the widow of Charles R. Snyder, Chief Pay Clerk, United States Navy, deceased, under the Act

Sworn to and subscribed before me, the undersigned Notary Public on this 11th day of May of 1945.

Maria Martinez S.,
MARIA MARTINEZ S.,
Notary Public in and for El Paso County, Texas.

26 EXHIBIT 2

EXEMFLIFIED COPY OF MARRIAGE RECORD

Application No. 63349 License No. 34536

Application Fee, $1.00, License Issued July 3, 1945, at 2:28 p. m.

Filed December 9, 1947. Harry M. Hull, Clerk.

APPLICATION FOR MARRIAGE LICENSE

I, the undersigned, do hereby make application for Marriage License as required by Chapter 91 of the Acts of 1937, for the following named parties:

Charles Richard Snyder and Madeline B. Ford. Residence of Groom, 581 Westfield Ave., Westfield, N. J. Age, 30, Color, W., Nativity, Ala., Occupation, U. S. Navy, and who is single.

.....
(State here whether single, widower, or divorced as the case may be)

Residence of Bride, Bowline & Cable Aves., Beachwood, N. J. Age, 33, Color, W., Nativity, Pa. Occupation, Clerk, and who is Divorced, New York, N. Y., May 2, 1945, Plntf. .....

Name of Person consenting if Groom is a Minor.....

.....
(parent or guardian)

Name of Person consenting if Bride is a Minor.....

.....

..... C. R. Snyder.....
(Witness) (Applicant)

....
(Witness) (Applicant)

The above parties are Not related. X.

Subscribed and sworn before me this 3rd day of July A. D. 1945.

RALPH R. CROTHERS,
Clerk of the Circuit Court for Cecil County.

Application Filed July 3, 1945 at 2:23 P. M.

MINISTER'S CERTIFICATE

I hereby certify, that on this 3d day of July, Nineteen hundred and forty-five the above-named persons were by me

of May 22, 1928, as amended (34 U. S. C. A. Section 943); that by letter dated June 26, 1947 the Bureau of Naval Personnel denied the aforesaid application, the denial being based upon the grounds that Madeleine Ursula Snyder was
51 not the lawful widow of Charles R. Snyder, Chief Pay Clerk, United States Navy, deceased; that the complaint in this action to compel the Paymaster General of the United States Navy to pay the plaintiff the aforesaid death gratuity was filed in the District Court of the United States for the District of Columbia on March 20, 1947 and service was acknowledged by the Navy Department on March 24, 1947; that nevertheless upon certification of the Director, Dependents Welfare Division, Bureau of Naval Personnel, the Chief of Field Branch, Bureau of Supplies and Accounts, Navy Department, Cleveland, Ohio caused the aforesaid death gratuity in the amount of Thirteen Hnudred and Sixty-five Dollars ($1,365.00) to be paid by United States Treasury check No. 244290, dated April 2, 1947 to Mrs. Dorothy H. Reul who had been found to be the dependent sister of the deceased, Charles R. Snyder.

III

That on October 4, 1937, Madeleine Ursula Bradley, who is the same person as Madeleine Ursula Snyder, the plaintiff herein, was married to James John Ford in Lansdowne, Pennsylvania; that thereafter the said Madeleine Ursula Ford and James John Ford lived together as husband and wife in divers places in the State of New Jersey until November 15, 1944, upon which date they were separated and did not live together at any time thereafter; that on the 26th day of April 1945 the said Madeleine Ursula Ford, then being a resident of the State of New Jersey, appearing through an attorney in the Republic of Mexico, filed a petition for divorce from the said James John Ford in the First Civil Court of the Bravos District, State of Chihuahua, Republic of Mexico; that on the 26th day of April 1945, James John Ford, then a resident of the state of Florida, appearing through an attorney in the Republic of Mexico, filed an answer to said petition of divorce in the First Civil Court of The Bravos District, State of Chihuahua, Republic of Mexico, praying that a decree of divorce be granted; that on the 27th day of April 1945 the cause came on to be heard and on May 2, 1945, a decree was entered by the said Court stating that the marital contract between the said Madeleine Ursula Ford and James John Ford was thereby dissolved; that the said Madeleine Ursula Ford was neither a resident of nor domiciled in the Republic of Mexico at or prior to the filing of the petition

united in marriage at Elkton, Md., in accordance with the License issued by the Clerk of the Circuit Court.

Signature, Rev. R. J. Sturgill.

Official Capacity, Baptist Minister, Address, Elkton, Md.

Filed and Recorded July 9, 1945.

RALPH R. CROTHERS,
Clerk of the Circuit Court for Cecil County.

27 CLERK'S CERTIFICATE

STATE OF MARYLAND,
Cecil County, to wit:

I, Ralph R. Crothers, Clerk of the Circuit Court for Cecil County, do Hereby Certify the aforegoing to be a True Copy of the Marriage of Charles Richard Snyder and Madeline B. Ford, taken from the Marriage Records now on file and of record in the Office of the Clerk of the Circuit Court for Cecil County.

In testimony whereof, I hereunto set my hand and affix the Seal of the Circuit Court for Cecil County, this 9th day of September in the year Nineteen Hundred and Forty-Six.

[SEAL] RALPH R. CROTHERS,
Clerk of the Circuit Court for Cecil County.

28 CERTIFICATE OF PRESIDING JUDGE

STATE OF MARYLAND, *ss:*

I, Floyd J. Kintner, one of the Presiding Judges of the Second Judicial Circuit of the State of Maryland, and as such Presiding Judge of the Circuit Court for Cecil County, do certify that the foregoing certified copy of the Marriage Record of Charles Richard Snyder and Madeline B. Ford made by Ralph R. Crothers, Clerk of the Circuit Court for Cecil County, whose name is thereunto subscribed, and the Seal of said Court affixed, is in due form and made by the proper officer.

Witness my hand this 9th day of September, in the year Nineteen Hundred and Forty-Six.

FLOYD J. KINTNER,
Presiding Judge of the Circuit Court for Cecil County.

29 CLERK'S CERTIFICATE

STATE OF MARYLAND,
Cecil County, to wit:

I, Ralph R. Crothers, Clerk of the Circuit Court for Cecil County, do Hereby Certify that the Honorable Floyd J. Kint-

ner, by whom the foregoing Certificate and Attestation were made, and whose name is thereto subscribed, was, at the time of making thereof, and still is one of the Presiding Judges of the Second Judicial Circuit of the State of Maryland, and as such Presiding Judge of the Circuit Court for Cecil County, duly commissioned and sworn, to all whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof, I hereunto set my hand and affix the Seal of the Circuit Court for Cecil County, this 9th day of September in the year Nineteen Hundred and Forty-Six.

[SEAL] RALPH R. CROTHERS,
Clerk of the Circuit Court for Cecil County.

30 EXHIBIT 3

Madeleine Ursula Snyder (Mrs. Charles Richard Snyder) v. United States (Charles Richard Snyder, deceased). Civil No. 1225–47

Refer to No. Pers–532–jam

Filed December 9, 1947. Harry M. Hull, Clerk.

NAVY DEPARTMENT,
BUREAU OF NAVAL PERSONNEL,
Washington 25, D. C., 26 June 1947

DEPARTMENT OF JUSTICE,
Veterans Affairs Section,
Washington, D. C.
(Attn: Mr. Tom Walsh.)

DEAR SIRS: In compliance with the request of Mr. John F. Sonnet, Assistant Attorney General, contained in letter with symbols, JFS:WHA 146–56–13, of 29 April 1947, to the Judge Advocate General of the Navy, there is submitted herewith a statement of the facts believed to be pertinent in connection with the subject suit pending in the District Court of the United States for the District of Columbia. Preparation of this reply has been deferred pending conferences between Mr. Walsh of the Department of Justice and representatives of the Bureau of Naval Personnel which have been held since receipt of the letter referred to.

Chief Pay Clerk Charles Richard Snyder, File Number 77867, United States Navy, was serving on active duty and attached to the U. S. Naval Air Station, Lakehurst, New Jersey, at the time of his death on 10 March 1946. According to the

information available in this Bureau his rate of pay, including longevity, at the time of death was $227.50 per month. Chief Pay Clark Snyder died as the result of an automobile accident which occurred on 8 March 1946 at Westfield, New Jersey. His death was held by the Judge Advocate General of the Navy to have occurred not as the result of his own misconduct.

Death gratuity beneficiary slips of Chief Pay Clerk Snyder up to and including 1 May 1945 contain the statement that he was not married. However, a beneficiary slip executed on 20 July 1945, the last beneficiary slip on file, gives the name of his wife as Madeleine Bradley Snyder, Bowline and Cable Avenues, Beachwood, New Jersey, and states that in the event he is not survived by a wife, the death gratuity shall be paid to Dorothy H. Reul, 581 Westfield Avenue, Westfield, New Jersey, who is shown to be his sister. Originals of the beneficiary slips are contained in the files of this Bureau.

Under date of 25 April 1946 Madeleine Ursula Snyder, the same Madeleine Bradley Snyder mentioned above, filed an application for death gratuity with the Casualty Section of this Bureau stating that she was the widow of the decedent. Under date of 9 May 1946, she filed a claim for the arrears of pay due the decedent. Before payment of the gratuity was made to the above claimant Mr. Harold Markowitz, Counsellor at Law, 24 Commerce Street, Newark, New Jersey, informed this Bureau that Mrs. Snyder, prior to her marriage to the decedent, had obtained a divorce in Mexico from Mr. James John Ford, which divorce Mr. Markowitz contended was invalid, and that as the result of such invalidity, the subsequent marriage to Chief Pay Clerk Snyder was also invalid. An investigation conducted thereafter confirmed that a divorce was granted in the suit of Madeleine Bradley Ford against James John Ford in the First Civil Court of the Bravos District, State of Chihuahua, Mexico. An affidavit in the files of this Bureau from the defendant in the foregoing case states that he was at no time a resident of Mexico, that he retained counsel residing in Mexico to appear for him in connection with the divorce action, and that he does not desire to question the validity of the decree.

31

In a letter under date of 6 June 1947, copy enclosed, Mr. Markowitz informed this Bureau that on 13 September 1946 in the Ocean County Orphan's Court, Toms River, New Jersey, in a matter pending at that time, Mrs. Madeleine Snyder on cross-examination admitted that she obtained this divorce

through a lawyer in New York City and never was present in Mexico. The same admission was made by James John Ford in the same manner at that time. Information as to the nature of the New Jersey proceedings and the preservation of the testimony referred to is contained in Mr. Markowitz's letter of 18 June 1947, copy of which is enclosed.

On 23 August 1946 the plaintiff in the pending suit against the United States was informed by letter of the Bureau of Naval Personnel that "Inasmuch as this decree is not recognized by this Bureau your subsequent marriage to the decedent is considered to be void ab initio. It is regretted therefore, that your claim for the arrears of pay and six months' death gratuity has been disallowed." The same information in effect was given to the claimant's attorney, Mr. Edward W. Haines, Professional Building, Toms River, New Jersey, in a letter under date of 23 October 1946. Copies of both letters are attached for your information.

Subsequent to the occurrences set forth above on 17 March 1947 the Director, Dependents Welfare Division of this Bureau certified to the Chief of Field Branch; Bureau of Supplies and Accounts, Navy Department, Cleveland, Ohio, the name of Mrs. Dorothy H. Reul as the proper beneficiary for payment of the six months' death gratuity, this sister having been named contingent beneficiary as stated above. This certification was pursuant to authority contained in Section 10 of Public Law 490, 77th Congress, as amended, and the delegation thereof in Secretary of the Navy letter, serial 312213, of 1 September 1944. Payment to Mrs. Reul of the death gratuity in the amount of $1,365.00 was made by U. S. Treasury Check No. 244290 dated 2 April 1947 prior to receipt in this Bureau of information as to the filing of subject suit against the United States.
32 Photostatic copies of Mrs. Reul's claim, the certification of her name as beneficiary, and of the voucher covering payment to her are enclosed for such information of value they may contain. The originals are assumed to be in the files of Field Branch, Bureau of Supplies and Accounts, Cleveland, Ohio, at present, but may be forwarded to the General Accounting Office at a later date with the disbursing officer's returns.

A certified copy of the marriage certificate of Madeleine Bradley Ford and Charles Richard Snyder in which application the bride is alleged to have stated that she was divorced in New York on 2 May 1945 has been requested from the Clerk of the Circuit Court, Cecil County, Maryland, but has not been received to date. Upon receipt the Department of Justice will be informed.

By direction of the Chief of Naval Personnel.
Yours very truly,

(S) J. R. Carnes,
J. R. CARNES,
Commander, USN, Officer in Charge,
Casualty Section.

cc: Office of Judge Advocate General, Attn. Lt. Comdr. Dick Wheat.

A true copy:

William C. Brewer,
WILLIAM C. BREWER,
Attorney, Department of Justice.

33 District Court of the United States for the District of Columbia

Civil Action No. 1225–47

MADELINE URSULA SNYDER, PLAINTIFF

v.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY, DEFENDANT

Filed January 23, 1948. Harry M. Hull, Clerk.

Opinion

Action by Madeline Ursula Snyder, the widow of an officer of the United States Navy, for relief in the nature of a mandamus against the Paymaster General of the Navy, to require him to pay her an amount equal to six months' pay at the rate received by the deceased at the date of his death. Judgment for the plaintiff.

John Geyer Tausig, Esq., of Washington, D. C. for the plaintiff.

George Morris Fay, Esq., United States Attorney; D. Vance Swann, Esq.; and William C. Brewer, Esq., all of Washington, D. C., for the defendant.

This is an action by the widow of a Naval officer for relief in the nature of a mandamus to direct the Paymaster General of the Navy to pay her an amount equal to six months' pay of the deceased at the rate received by him at the time of his death.

34 The pertinent statute provides that upon the death, from wounds or disease, of any officer or enlisted man

on the active list of the regular Navy or regular Marine Corps, the Paymaster General of the Navy shall cause to be paid to the widow an amount equal to six months' pay at the rate received by the deceased at the time of his death. If there be no widow, the payment is to be made to his child or children, and if there be no widow or child, then to any other dependent relative of the deceased previously designated by him.[1]

35 The plaintiff and the deceased were married on July 3, 1945, at Elkton, Maryland, and lived together as man and wife until the husband's death on March 10, 1946. The Paymaster General of the Navy declined to pay the statutory allowance to the plaintiff, on the alleged ground that her marriage to the deceased was invalid. The basis for this conclusion was that the plaintiff had been previously married; that the prior marriage ended in a divorce obtained in Mexico, although neither of the parties to the marriage was a resident of that country at the time when the divorce was granted; that this divorce was ineffective; and that, therefore, the plaintiff was not free to contract the second marriage. As the deceased left no children, the Navy Department paid the allowance to his sister.

The first question to be determined is whether the ruling of the Navy Department is subject to judicial review. It may be assumed, without deciding, that prior to the enactment of the Administrative Procedure Act of June 11, 1946, the action of the Navy Department would have been final and conclusive, and could not have been reexamined by the courts. A long, unbroken line of authorities upholds the doctrine that a writ of mandamus may not be granted to compel the performance of a duty on the part of a public officer involving the determination

[1] The pertinent provisions of the statute (58 Stat. 129; U. S. Code, title 34, sec. 943) read as follows:

"Immediately upon official notification of the death from wounds or disease, not the result of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of the Regular Navy or Regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow, to the child or children, and if there be no widow or child, to any other dependent relative of such officer, enlisted man, or nurse previously designated by him or her, an amount equal to six months' pay at the rate received by such officer, enlisted man, or nurse at the date of his or her death. The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. Said amount shall be paid from funds appropriated for the pay of the Navy and pay of the Marine Corps, respectively: *Provided*, That if there be no widow, child, or previously designated dependent relative, the Secretary of the Navy shall cause the amount herein provided to be paid to any grandchild, parent, brother or sister, or grandparent shown to have been dependent upon such officer, enlisted man, or nurse prior to his or her death, *and the determination of such fact by the Secretary of the Navy shall be final and conclusive upon the accounting officers of the Government:* * * *" [Italics supplied.]

of questions of law or fact, as this remedy is limited to ministerial acts, Brunswick v. Elliott, 70 App. D. C. 45; Southern Transp. Co. v. Interstate Commerce Com., 61 App. D. C.
36 284.[2] The question arises, however, whether the Administrative Procedure Act (Act of June 11, 1946; U. S. Code, Title 5, Secs. 1001–1011) has changed the law in this respect. We therefore, proceed to an analysis of this statute.

Section 2 (a) of the Act defines the extent of the statute. It in effect provides that the Act applies to each authority of the Government of the United States, except the Congress, the Courts, the territorial governments, and the District of Columbia. For certain purposes, it also excepts courts-martial and military commissions as well as military or naval authority exercised in the field in time of war, or in occupied territory. It also excludes functions performed under the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944.[3]
37 The Navy Department, therefore, is not exempted from the provisions of the statute, except in respect to naval authority exercised in the field in time of war or in occupied territory, and in respect to courts-martial. All other activities of the Navy Department, including the one involved in this case, are within the scope of the Act.

Judicial review of administrative action is governed
38 by Section 10 of the Act.[4] Two classes of actions are

[2] See also Silberschein v. United States, 266 U. S. 221.

[3] The pertinent portions of Section 2 of the Administrative Procedure Act, read as follows:

"(a) *Agency.*—'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944."

[4] The pertinent portions of Section 10 of the Administrative Procedure Act are as follows:

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the

excepted from the right of judicial review: first, those as to which statutes preclude judicial review; and, second, those as to which agency action is by law committed to agency discretion. A statute precluding judicial review may be one which expressly provides that any administrative action taken thereunder may not be reexamined and set aside by the courts. Or without expressly so asserting, it may clearly and affirmatively indicate that the action of the administrative agency is to be deemed final and conclusive for all purposes. For example, some of the statutes relating to the activities of the Veterans' Administration have been so construed, *Silberschein* v. *United States*, 266 U. S. 221.

In the case at bar, however, there is no such indication. On the contrary, the opposite inference is warranted. The first proviso of the statute governing the payment of the allowance provides that the determination by the Secretary of the Navy of the fact that there is no widow shall be final and conclusive upon the accounting officers of the Government. The obvious meaning of this limitation is that the rulings of the
39 Secretary of the Navy in such matters are not reviewable by the Comptroller General. Expressio unius est exclusio alterius. On the basis of this canon of statutory construction, this provision should be interpreted as meaning that the determination of the Secretary of the Navy shall be final and conclusive on the Comptroller General of the United States, but on no one else. The conclusion irresistibly follows that the statute in question does not preclude judicial review.

The second exception comprizes agency action which is by law committed to agency discretion. Among many illustrations of such actions are the making of contracts, the making of loans by lending agencies of the Government, the issuance of passports and visas by the Department of State, the issuance

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subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

of visitors' permits by the Immigration and Naturalization Service, and countless other matters in which the agency is permitted by law to reach a conclusion on the basis of its own judgment and discretion. Obviously, the action involved in the instant case is not within the realm of administrative discretion, as the statute creates a legal duty on the part of the Paymaster General of the Navy to pay the prescribed allowance on the occurrence of the specified contingency. It follows, hence, that the ruling involved in the instant case is not within the excepted categories in respect to judicial review.

Subsection (a) confers the right to secure a judicial review on any person adversely affected or aggrieved by any agency action within the meaning of any relevant statute. The effect of this provision is, on the one hand, to exclude from the right of judicial review all Governmental action affecting the public generally, but not impinging on the legal rights of any individual;[*] and, on the other hand, to permit an appeal to the courts by any person whose individual legal rights are adversely affected. Obviously, the plaintiff is aggrieved by the defendant's denial of her claim to a widow's gratuity and, therefore, is accorded the privilege of a resort to the courts.

Subsection (c) provides that every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

The conclusion is inescapable that under the Administrative Procedure Act every final agency action is subject to judicial review at the behest of any person whose legal rights are adversely affected, unless the action is taken under a statute precluding judicial review, or unless the agency action is by law committed to agency discretion.

In this connection, it is desirable to consider subsection (b) of Section 10, which provides that the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any *applicable* form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. In other words, if there is provided an adequate specified statutory review proceeding in respect to any specified agency

[*] E. g. a taxpayer may not sue to obtain unlawful expenditure of public funds, *Frothingham* v. *Mellon*, 262 U. S. 447; a power company may not secure an injunction against the making of a grant or loan to a Governmental unit maintaining a competing plant, *Alabama Power Co.* v. *Ickes*, 302 U. S. 464.

action, this form of proceeding should be pursued. In the absence or inadequacy of any such proceeding, recourse may be had to any applicable form of legal action. By the word "applicable" is meant "appropriate or suitable." Consequently, the aggrieved party may invoke any suitable or appropriate form of proceeding or remedy.

Thus the Standard Dictionary defines the word "applicable" as follows: "Applicable, capable of being applied; suitable or fit for application; relevant, fitting." Webster's Dictionary contains the following definition: "Capable of being applied; fit; suitable; pertinent." Black's Law Dictionary (3d) Ed.) p. 125, defines the term as follows: "Applicable, fit, suitable, pertinent, or appropriate." The word "applicable", therefore, is not a term of limitation but of description.

The reports of the Committees on the Judiciary of the Senate and House of Representatives, concerning this legislation clearly indicate that the foregoing conclusions are in accord with the legislative intent. Thus the Report of the Senate Committee on the Judiciary (S. Rept. No. 752, 79th Congress) submitted by Senator McCarran, states that the legislation "sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong". This Report in discussing Section 10 (a) makes the following observation:

"Any person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review.

"This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."

42 The Report contains the following comment in respect to Section 10 (c):

"Agency action made reviewable specially by statute or final agency action for which there is no other adequate judicial remedy is subject to judicial review."

A similar statement is found in the Report of the House Committee on the Judiciary (H. Rept. No. 1980, 79th Cong., 2d Sess.):

"The foregoing analysis irresistibly leads to the conclusion that every final agency action which is not in the realm of discretion, or in respect to which no statute precludes judicial review, and which adversely affects the legal rights of any person, is subject to judicial review under the Administrative Procedure Act. The form of review is any suitable or appropriate proceeding, unless an adequate remedy is otherwise provided by a special statute. A review may, for example, be had by an action for a declaratory judgment, by an action for a re-

straining or mandatory injunction, by a petition for a writ of habeas corpus, or some other fitting remedy. This result necessarily subjects to judicial review a large group of administrative actions which previously could not have been reexamined or set aside by the courts. This category includes numerous determinations of private rights, in respect to which a writ of mandamus did not lie, because they involved functions that were not purely ministerial, but required a decision on questions of law or questions of fact by the administrative agency. On the other hand, the countless diversified activities of executive and administrative agencies that are committed
43 to their discretion or that do notimpinge on private rights, remain unaffected. Consequently, this interpretation of the Act, which appears to this Court to be inescapable, will not impede or interfere with the operations of the Government. On the other hand, it will extend the right of judicial review to all persons whose private rights are adversely affected by final agency action that is not discretionary in character and in respect to which no statute bars judicial review. This result seems sound and salutary. It is in the interest of protecting and safeguarding the rights of the individuals. In any event, it is clear that this is what the Congress intended to accomplish.[6]

In view of the foregoing discussion, rulings of the Navy Department under the statute involved in the instant case have become subject to judicial review under the provisions of the Administrative Procedure Act.

We, therefore, reach a consideration of the ruling of the Navy Department on the plaintiff's claim for a widow's allowance. Section 10 (e) of the Administrative Procedure Act, which relates to the scope of judicial review, authorizes the reviewing court to decide all relevant questions of law and to set
44 aside agency action found not to be in accordance with law. As in this case the facts are stipulated, the only question for the Court to determine is whether the Navy Department correctly applied the law to the facts.

The plaintiff married one James John Ford on October 4, 1937 in Lansdowne, Pennsylvania. Thereafter she and her

[6] The Court is not unmindful of the fact that some statements have been made to the effect that Section 10 is merely declaratory of existing law of judicial review, and does not confer jurisdiction on the courts beyond that which they already had, e. g. Olin Industries v. National Labor Relations Board (Mass.), 72 F. Supp. 225. While this Court has examined many of these statements, it is unable to agree with them. On the other hand, McGranery, J. in United States v. Carusi (ED-Pa.) 72 F. Supp. 193, 196, said: "The Administrative Procedure Act may conceivably provide judicial review of the operation of those agencies where none existed before, although the Court expresses no opinion on that."

husband resided in New Jersey. They were separated in November 1944. On April 27, 1945 the plaintiff obtained a divorce in the State of Chihuahua, Republic of Mexico. Her husband filed an answer in the divorce proceeding in which he joined in the prayer for a decree of divorce. Neither party to the suit was a resident of Mexico and neither personally appeared in that country. On July 3, 1945, the plaintiff married Charles Richard Snyder, a member of the naval personnel. At the time of their marriage, both parties were residents of New Jersey and continued to reside in that State, during their entire married life. The marriage, however, was performed in Elkton, Maryland. The husband died on March 10, 1946. At the time of his death the parties were living together.

The plaintiff filed an application as the widow of Charles Richard Snyder for an allowance under the statute heretofore mentioned. The Bureau of Naval Personnel, after an investigation, concluded that the divorce obtained by the plaintiff in Mexico from her first husband was not entitled to recognition and that, therefore, her subsequent marriage to the deceased was invalid. On this basis, the Navy Department declined to approve the plaintiff's claim for an allowance equal to six months' pay of the deceased; but paid this sum to his sister. Whether the plaintiff is entitled to the widow's allowance depends on whether her marriage to the deceased was valid or even if it was invalid, whether it is subject to a collateral attack by an administrative agency.

The parties entered into the married state by a ceremony performed by a minister. The inference is clear that they considered themselves free to marry. They lived together as husband and wife until the husband's death, and no doubt deemed themselves lawfully married. The deceased apparently never thought there was an infirmity in his marriage. He named his wife as the beneficiary of his life insurance policy under the National Life Insurance Act and also designated her as the proper recipient of a widow's allowance. He evidently went to his death without questioning or doubting the validity of his marriage.

The marriage was celebrated in Maryland, although both before and after the marriage ceremony the parties were residents of the State of New Jersey. The preliminary question to be determined is whether the law of New Jersey or the law of Maryland is applicable. It is well settled that the law of the place where a marriage is celebrated governs the validity of the marriage. Loughran v. Loughran, 292 U. S. 216; Rhodes v. Rhodes, 68 App. D. C. 313; U. S. ex rel. Modianos v. Tuttle 12 F. (2d) 927; Franzen v. E. I. DuPont De Nemours & Co.,

146 F. (2d) 837; Hitchens v. Hitchens, 47 F. Supp. 73; Fensterwald v. Burk, 129 Md. 131; Beale, The Conflict of Laws, Vol. II, pp. 667–669; Restatement—Conflict of Laws,
46 pp. 185–187. This doctrine applies even if the parties are domiciled in a State different from that in which the marriage is celebrated, Hitchens, v. Hitchens, supra; Fensterwald v. Burk, supra. The only exception to the general principle comprizes incestuous and polygamous marriages, which are abhorrent to the general standards of morality. Consequently, in the instant case the validity of the marriage must be determined by the law of Maryland rather than by the law of New Jersey.

The Code of Maryland, Article 62, Section 16, provides, in part, as follows:

"The Circuit Court for the several counties and the superior court of Baltimore City may, upon petition of either of the parties, inquire into, hear and determine and the circuit court for the several counties and the criminal court of Baltimore, on indictment, may inquire into, hear and determine the validity of any marriage and may declare any marriage contrary to the table in this article, or any second marriage, the first subsisting, null and void; * * *."

In Harrison v. State, 22 Md. 468, 490, the Court held that a marriage within the prohibited degrees was not void but voidable.

The statute just quoted was construed and applied in Ridgely v. Ridgely, 79 Md. 298. In that case a woman, who had resided in Maryland with her husband, went to South Dakota and obtained an absolute divorce in that State. Thereafter she returned to Maryland and contracted another marriage. Her first husband brought a suit in equity to annul the second marriage on the ground that the divorce procured in South Dakota
47 was void and that, therefore, the wife was not competent to contract a second marriage. The court held that the second marriage might be annulled only in an action brought by one of the parties thereto. The conclusion seems to follow that under the law of Maryland, a marriage contracted by a person who is not free to marry is voidable, and may be annulled only by a decree of a court rendered in an action brought by one of the parties to the marriage.

Since in this instance no action to annul the marriage was ever brought by either party during the husband's lifetime, under the law of Maryland the marriage is not subject to attack collaterally. It follows, hence, that the plaintiff must be deemed to be the widow of the deceased and, as such, entitled to a widow's allowance.

In this connection it may be observed that to brand a marriage as invalid is a solemn matter. Such an adjudication may ordinarily be made only by a court of competent jurisdiction after a trial at which all interested parties have an opportunity to be heard. It is at best questionable whether an administrative agency, such as the Veterans' Administration, the Navy Department, or the War Department, has any authority to hold a marriage invalid in an *ex parte* manner on the basis of its own investigation. As a matter of public policy, it does not appear appropriate that an administrative agency of the Government should delve and dig into family skeletons in an endeavor to upset a marriage openly celebrated and apparently valid on its face, and which was deemed lawful by the parties thereto in their lifetime. The Congress did not intend
48 that the Navy Department should pursue such a course, as is evidenced by the fact that the statute expressly requires payment of the widow's allowance to be made "immediately" upon official notification of the death of the deceased. Obviously, the Congress did not intend to vest in the Navy Department any authority to make exhaustive administrative investigations for the purpose of passing on the validity of a marriage apparently valid on its face.

The Court will accordingly render judgment directing the Paymaster General of the Navy to pay to the plaintiff the statutory widow's allowance.

The complaint prays for relief in the nature of a mandamus. This relief is inappropriate, in view of the fact that the act required to be performed is not purely ministerial. The plaintiff is entitled, however, to whatever judgment the evidence warrants, irrespective of whether it is the precise relief prayed for in the complaint.[1]

Under Section 10 (b) of the Administrative Procedure Act, any applicable (i. e. suitable) form of relief may be granted. The statute expressly suggests a mandatory injunction as a possible form of relief. Accordingly, the judgment will take the form of a mandatory injunction directing the necessary payment. It is sufficient that the Paymaster General of the Navy be the sole defendant, as in the light of the decision of the Supreme Court in Williams v. Fanning (decided Decem-
49 ber 8, 1947), the Secretary of the Navy is not an indispensable party.

Judgment for the plaintiff granting a mandatory injunction directing the defendant to pay to the plaintiff an amount equal to six months' pay at the rate received by the deceased at the time of his death.

[1] Rule 54 (c) of the Federal Rules of Civil Procedure.

52 for divorce or the entry of the aforesaid decree; that the said James John Ford was neither a resident of, nor domiciled in the Republic of Mexico at or prior to the filing of the petition for divorce or the entry of the aforesaid decree; that all negotiations leading up to the filing of the petition, the answer, and the entry of the decree of the said Court in the Republic of Mexico were handled through correspondence with attorneys in the Republic of Mexico.

IV

That on the 3rd day of July 1945 Charles R. Snyder, a resident of Westfield, New Jersey, and the said Madeleine Bradley Ford, a resident of Beechwood, New Jersey, entered into a ceremonial marriage at Elkton, Maryland, and on the same day returned to, and thereafter lived together as husband and wife in the state of New Jersey until the death of the said Charles R. Snyder on March 10, 1946.

V

That at the time of the marriage of Madeleine Ursula Ford to Charles R. Snyder, her marriage to James John Ford had not, and has never since, been terminated by a divorce decree entered by any Court of the United States, or by the Court of any other country having jurisdiction of the marital res.

VI

That on the 3rd day of July 1945 and on the 10th day of March 1946, James John Ford was living.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact the Court hereby makes the following conclusions of law:

I

That the Administrative Procedure Act of June 11, 1946, (5 U. S. C. A. Sections 1001–1011) gave this Court jurisdiction of this cause and of the parties hereto and authority to review the determination of the Navy Department which has adversely affected the plaintiff and impinged on her legal rights as an individual.

II

That in order to be entitled to the death gratuity which is the subject matter of this cause of action, the plaintiff

53 must be the lawful widow of Charles R. Snyder, Chief Pay Clerk, United States Navy, deceased, so as to come within the permitted class of beneficiaries, as prescribed by the Act of May 22, 1928 as amended (34 U. S. C. A. Section 943).

III

That the law of the place where a marriage is celebrated governs the validity of the marriage, even if the parties thereto are domiciled in a State different from that in which the marriage is celebrated, unless the marriage is incestuous or polygamous; that consequently, in the instant case the validity of the marriage must be determined by the law of Maryland (the place where the plaintiff's marriage to Charles R. Snyder, Chief Pay Clerk, United States Navy, deceased, took place) rather than by the law of New Jersey (the State where the plaintiff and the deceased were domiciled both prior to and after the said marriage); that under the law of Maryland said second marriage is not void, but voidable and therefore its validity may not be attacked collaterally by persons not parties to the said marriage; and that therefore the plaintiff must be deemed to be the lawful widow of the deceased and, as such, entitled to the aforesaid death gratuity, as provided for by the Act of May 22, 1928, as amended (34 U. S. C. A. Section 943).

IV

That the complaint prays for relief in the nature of mandamus but this relief is inappropriate, in view of the fact that the act required to be performed by the Paymaster General of the United States Navy is not purely ministerial; that the plaintiff is entitled, however, to whatever judgment the evidence warrants, irrespective of whether it is the precise relief prayed for in the complaint; that under Section 10 (b) of the Administrative Procedure Act of June 11, 1946 (5 U. S. C. A. Section 1001–1011) any applicable (i. e. suitable) form of relief may be granted and the Act expressly suggests a mandatory injunction as a possible form of relief; and that accordingly, the judgment will take the form of a mandatory injunction directing the necessary payment.

V

That it is sufficient that the Paymaster General of the United States Navy be the sole defendant, as the Secretary of the Navy is not a indispensable party.

54 VI

That the defendant be enjoined and restrained from persisting in his refusal to pay the plaintiff an amount equal to six months' pay at the rate received by Charles R. Snyder, Chief Pay Clerk, United States Navy, at the date of his death, to which amount the plaintiff became entitled under the Act of May 22, 1928, as amended (34 U. S. C. A. Section 943) by reason of the official notification given to the defendant of the death of the plaintiff's husband, the aforesaid Charles R. Snyder, Chief Pay Clerk, United States Navy, deceased, from wounds not the result of his own misconduct; and the defendant is directed to pay the plaintiff Thirteen Hundred and Sixty-five Dollars ($1365.00) which is the amount equal to six months' pay at the rate received by the deceased at the time of his death.

This 29th day of January 1948.

ALEXANDER HOLTZOFF,
Justice.

55 In the District Court of the United States
for the District of Columbia

Civil Action No. 1225–47

MADELEINE URSULA SNYDER, PLAINTIFF

v.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY, DEFENDANT

Filed January 30, 1948. Harry M. Hull, Clerk.

Judgment

The Court having made findings of fact and conclusions of law in favor of the plaintiff, Madeleine Snyder, and against the defendant, Rear Admiral W. A. Buck, Paymaster General of the Navy, it is by the Court, ordered, adjudged and decreed, as follows:

1. That the defendant is enjoined and restrained from persisting in his refusal to pay the plaintiff an amount equal to six months' pay at the rate received by Charles R. Snyder, Chief Pay Clerk, United States Navy, at the date of his death, to which amount the plaintiff became entitled under the Act of May 22, 1928, as amended (34 U. S. C. A. Section 943) by reason of the official notification given to the defendant of the

death of the plaintiff's husband, the aforesaid Charles R. Snyder, Chief Pay Clerk, United States Navy, deceased, from wounds not the result of his own misconduct; and the defendant is directed to pay the plaintiff Thirteen Hundred and Sixty-five Dollars ($1,365.00) which is the amount equal to six months' pay at the rate received by the deceased at the time of his death.

This 29th day of January 1948.

ALEXANDER HOLTZOFF,
Justice.

Approved as to form:

WILLIAM C. BREWER,
Attorney, Department of Justice,
Attorney for the Paymaster General of the Navy.

56 In the District Court of the United States for the District of Columbia

Civil Action No. 1225–47

MADELEINE URSULA SNYDER, PLAINTIFF

vs.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY, DEFENDANT

Filed March 18, 1948. Harry M. Hull, Clerk.

Notice of appeal

Notice is hereby given that Rear Admiral W. A. Buck, Paymaster General of the Navy, defendant, hereby appeals to the United States Court of Appeals for the District of Columbia, from the final judgment entered in this action on the 30th day of January 1948.

George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney,

D. Vance Swann,
D. VANCE SWANN,
Attorney, Department of Justice,

William C. Brewer,
WILLIAM C. BREWER,
Attorney, Department of Justice,
Attorneys for Defendant.

Copy to Mr. John G. Tausig, Attorney for the Plaintiff, 1011 Investment Building, Washington, D. C.

57 In the District Court of the United States for the District of Columbia

Civil Action No. 1225–47

MADELEINE URSULA SNYDER (MRS. CHARLES RICHARD SNYDER), PLAINTIFF

vs.

REAR ADMIRAL W. A. BUCK (S. C. U. S. N.), PAYMASTER GENERAL OF THE NAVY, DEFENDANT

Filed March 24, 1948. Harry M. Hull, Clerk.

Designation of record

The defendant, Rear Admiral W. A. Buck (S. C. U. S. N.), Paymaster General of the Navy (appellant), by counsel, designates the following items of record in the above-entitled case to be printed for the purpose of appeal taken herein:

1. Complaint.
2. Answer.
3. Report of Commissioner on Veterans' Cases.
4. Stipulation of Facts.
5. Memorandum Opinion of Justice Holtzoff.
6. Findings of Fact and Conclusions of Law.
7. Judgment.

George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney,
D. Vance Swann,
D. VANCE SWANN,
Attorney, Department of Justice,
William C. Brewer,
WILLIAM C. BREWER,
Attorney, Department of Justice,
Attorneys for defendant (appellant).

I certify that a copy of the foregoing Designation of Record was this 24th day of March 1948 mailed to John G. Tausig, Attorney for Plaintiff, 1011 Investment Building, Washington, D. C.

William C. Brewer,
WILLIAM C. BREWER,
Attorney, Department of Justice.

58 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Harry M. Hull, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered 1 to 57, both inclusive, to be a true and correct transcript of the record according to designation of record by counsel filed and made a part of this transcript, and pursuant to Rule 75 (g) of the Federal Rules of Civil Procedure for the District Courts of the United States, in action entitled Madeleine Ursula Snyder, Plaintiff, vs. Rear Admiral W. A. Buck, Paymaster General of the Navy, Defendant, Civil Action No. 1225–47, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of April 1948.

[SEAL]

HARRY M. HULL, *Clerk.*
By ROBERT M. STEARNS,
Deputy Clerk.

[Endorsement on cover:] No. 9847. Rear Admiral W. A. Buck, Appellant, vs. Madeleine Ursula Snyder, Appellee. United States Court of Appeals for the District of Columbia. Filed April 26, 1948. Joseph W. Stewart, Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1948

[fol. 44] [File endorsement omitted]

[fol. 45] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9847

REAR ADMIRAL W. A. BUCK, Paymaster General of the Navy, Appellant,

v.

MADELEINE URSULA SNYDER, Appellee

Appeal from Judgment of the District Court of the United States for the District of Columbia

MEMORANDUM SUGGESTING A QUESTION OF ABATEMENT—Filed March 22, 1949

This memorandum on the question of possible abatement in this case, is submitted in compliance with Chief Judge Clark's request at the oral argument.

The judgment of the District Court in this case was entered on January 30, 1948 and directed Rear Admiral Buck, Paymaster General of the Navy, to pay to the plaintiff the six-month death gratuity under the Act of June 4, 1920 (41 Stat. 824, as amended, 34 U.S.C. 943). On March 1, 1948, Rear Admiral Buck retired and was succeeded in office on that date by Rear Admiral Edwin D. Foster. Rear Admiral Foster's nomination to the office of Paymaster General had previously been confirmed by the Senate on February 18, 1948, for a four-year term (94 Cong. Rec. 1410, 1411). Rule 28(b) of this Court and Section 11 of the Act of February 13, 1925 (28 U.S.C. 780(a)),[1] cited in the Rule, requires that the motion for substitution be made within

[1] Section 11 was repealed as of September 1, 1948, the date on which the statutory period for substitution in this case expired (Act of June 25, 1948, Pub. L. 773, 80th Cong., 2d Sess., Secs. 38 and 39). Moreover, Section 39, which effected the repeal, preserved "any rights * * * now existing", and would not, therefore, seem to have any application in the instant case.

[fol. 46] six months after the predecessor officer has ceased to hold office. This six-month period for substitution expired in this case on September 1, 1948. The failure of both parties in this case to make any substitution raises the question as to whether this action may have abated beyond any possibility of revival. (See *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590; *Matheus* v. *United States ex rel. Cunningham*, 282 U. S. 802; *United States ex rel. Trinler* v. *Carusi*, 168 F. 2d 1014 (C.A. 3); *United States* v. *Boutwell*, 17 Wall. 604, 608; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *United States ex rel. Bernadine* v. *Butterworth*, 169 U. S. 600).

Such a failure to substitute within the period allowed has not been allowed to compel an abatement in situations "where the cause was permitted to proceed without question, as instituted," and where the predecessor officer has not completely severed his connections with the agency or department involved but merely no longer has the same official powers and functions. *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 426; see *Hiatt* v. *Smith*[2], Supreme Court No. 457, Oct. T. 1948, motion for substitution granted, February 7, 1949, 17 U. S. Law Week 3238. The facts of the instant case, we believe, fall within the ambit of the *Volpe* case. Rear Admiral Buck, being on the retired list, may be ordered to active duty by the Secretary of Navy. This recall, in time of war or national emergency, may be ordered without Admiral Buck's consent; and with his consent at all other times. Act of August 22, 1912, 37 Stat. 329, 34 U.S.C. 422; Act of July 1, 1918, 40 Stat. 717, 34 U.S.C. 423.

We have no desire to have this cause abate. Accordingly, on the authority of the *Volpe* and *Hiatt* cases, it is suggested that this Court may, if it deems it appropriate, hold that the cause has not abated.

[fols. 47-64] If this Court agrees with our suggestion, the Government respectfully requests that the present Paymaster General of the Navy be substituted in place of Rear Admiral Buck; and this memorandum may accordingly be treated as a motion for that purpose. If, however, this

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[2] A copy of the Government's memorandum in the *Hiatt* case, containing a full discussion of the abatement question, is attached hereto for the convenience of the Court.

Court should consider that the cause has abated beyond possibility of revival, it is suggested that the cause be remanded to the District Court with directions to dismiss the cause as abated.[3]

Respectfully submitted, H. G. Morison, Assistant Attorney General. George Morris Fay, United States Attorney. D. Vance Swann, Chief, Veterans' Affairs Section, Department of Justice.

Of Counsel: Samuel D Slade, Morton Hollander, Attorneys, Department of Justice.

March, 1949.

[fol. 65] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1949

No. 9847

REAR ADMIRAL W. A. BUCK, Paymaster General of the Navy, Appellant,

v.

MADELINE URSULA SNYDER, Appellee

Before: Clark, Prettyman, and Proctor, Circuit Judges

ORDER VACATING JUDGMENT OF DISTRICT COURT ETC.—Filed November 16, 1949

This cause came on to be heard on the transcript of record from the United States District Court for the District of Columbia, and was argued by counsel; and there-

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[3] A determination that the cause has abated will not leave appellee remediless. Since the six-year limitation period under the Tucker Act will not expire before 1952, appellee may, as suggested at page 7 of our brief, institute suit directly against the United States under that Act. Or, if appellee persists in seeking relief from the Paymaster General, a course which we feel improper for the reasons set forth in our brief, she may re-institute suit against Rear Admiral Foster, the present Paymaster General.

after on request of the court the parties filed memoranda on the question whether the case has abated.

On consideration whereof, and it appearing that appellant Rear Admiral W. A. Buck, sued herein as Paymaster General of the Navy, resigned such office on March 1, 1948, and was succeeded by Rear Admiral Edwin D. Foster, who now holds that office, and it appearing that no motion was made under Section 11 of the Act of February 13, 1925 (formerly Sec. 780, Title 28, U. S. Code, which was repealed by the Act of June 25, 1948, Ch. 646, 62 Stat. 992, effective September 1, 1948), requesting the Court to "permit the cause to be continued and maintained by or against the successor in office of such officer," and that the six months period within which such a motion could have been made expired September 1, 1948, and the Court being of opinion that the action has abated because of failure to substitute appellant's successor [see Defense Corp. v. Lawrence Co., 336 U. S. 631 (1949), particularly that portion of the opinion dealing with United States ex rel. Claussen v. Curran, 276 U. S. 590 (1928)], It is

Ordered by the Court that the judgment of the District Court on appeal in this case be, and it is hereby, vacated and that this case be, and it is hereby, remanded to the District Court with directions to dismiss the complaint as abated.

Per Curiam.

Dated November 16, 1949.

[fol. 65-A] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER—Filed January 16, 1950

On consideration of appellee's motion to authorize the Clerk to transmit the original transcript of record herein to the Supreme Court and to furnish appellee with a certified transcript of the record, without prepayment of costs, for

filing in the Supreme Court in connection with a petition for allowance of a writ of certiorari, It is

Ordered by the Court that the Clerk be, and he hereby is, authorized and directed to transmit to the Supreme Court the original transcript of record from the District Court in this cause and to furnish appellee with a certified transcript of record, without prepayment of costs.

Per Curiam.

Dated January 16, 1950.

[fol. 66] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

DESIGNATION OF RECORD—Filed December 30, 1949

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above entitled cause, and included therein the following:

1. Printed transcript of record.
2. The memorandum suggestion the question of abatement, originally filed by appellant.
3. *Per curiam* order of this Court filed November 16, 1949.
4. This designation.
5. Clerk's certificate.

John Geyer Tausig, Esq., Attorney for Appellee, 1011 Investment Building, Washington, D. C.

I certify that a copy of the foregoing Designation of Record was mailed postage prepaid to D. Vance Swann, Esq., Department of Justice, Washington, D. C., on December 30, 1949.

John Geyer Tausig, Esq.

[fol. 67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 294, Misc.

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ORDER GRANTING MOTION TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR CERTIORARI ETC.—May 8, 1950

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted and the case is transferred to the appellate docket as No. 811.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 64

MADELEINE URSULA SNYDER,

Petitioner,

vs.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR MADELEINE URSULA SNYDER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 64

MADELEINE URSULA SNYDER,

Petitioner,

vs.

REAR ADMIRAL W. A. BUCK, PAYMASTER GENERAL OF THE NAVY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR MADELEINE URSULA SNYDER

Opinions Below

The opinion of the United States District Court for the District of Columbia (R. 26-36) is reported at 75 F. Supp. 902. The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (R. 46, 47), vacating the District Court judgment against Rear Admiral W. A. Buck, Paymaster General of the Navy and directing the dismissal of the complaint as abated, is not reported.

Jurisdiction

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, 28 U. S. C. A. 1254.

Question Presented

Does Section 11 of the Act of February 13, 1925 cause the abatement of a money judgment entered in the form of a mandatory injunction by the District Court against a Paymaster General of the Navy, when he resigns from office subsequent to the entry of that judgment, when his successor in office is not substituted as a party defendant in the District Court within six months after the resignation, and when no valid appeal is taken from the District Court judgment.

Statute Involved

Section 11 of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C. A. 780(a) provides in pertinent part:

> "Sec. 11(a) That where, during the pendency of an action, suit or other proceeding brought by or against an officer of the United States, * * *, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

Statement of the Case

Madeleine Ursula Snyder, as widow of Charles R. Snyder, deceased naval officer, brought an action in the United

States District Court for the District of Columbia to compel Rear Admiral W. A. Buck, Paymaster General of the Navy, to pay her the six months death gratuity provided by the Act of May 28, 1928, 45 Stat. 710, as amended, 34 U. S. C. A. 943 (R. 1-3). In due time the defendant filed an answer to the complaint (R. 4, 5).

After a trial without a jury, the District entered a final judgment in the form of a mandatory injunction against Rear Admiral W. A. Buck, Paymaster General of the Navy, directing him to pay Madeleine Ursula Snyder the six months death gratuity in the amount of $1,365.00. *This final judgment was entered on January 30, 1948*[1] (R. 40, 41).

On March 18, 1948, Rear Admiral W. A. Buck, purporting to act in the official capacity of Paymaster General of the Navy, filed Notice of Appeal from the District Court's final judgment (R. 41). Thereafter, purporting to act in the same official capacity, he filed a Designation of record (R. 42), had the record printed and transmitted to the Court of Appeals for the District of Columbia Circuit (R. 43) and filed a Brief for Appellant. In due time Madeleine Ursula Snyder filed Brief for Appellee.

Oral argument of the Appeal of Rear Admiral Buck in the official capacity of Paymaster, was scheduled for *March 18, 1949*. At that time and without prior actual or constructive notice to the Court of Appeals or to the Appellee, Rear Admiral Buck orally suggested to the Court that the action, including the final judgment of the District Court, had abated by reason of the fact that *he had resigned from the office of Paymaster General of the Navy on March 1, 1948* and on that date had been succeeded by Rear Admiral Edwin D. Foster and no motion had been made pursuant to Rule 28(b) of the Court of Appeals and Section 11 of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C. A.

[1] All emphasis throughout this Brief is supplied by Petitioner.

780(a) to substitute Rear Admiral Foster as Appellant in this case within six months from the date Rear Admiral Buck resigned from the office of Paymaster. Subsequently this suggestion of abatement was set forth in a written memorandum which was filed with the Court of Appeals (R. 44-46).

Upon the authority of *Defense Supplies Corp.* v. *Lawrence Warehouse Corp.*, 336 U. S. 631, "particularly that portion of the opinion dealing with *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590," the Court of Appeals held that under the provisions of Section 11 of the Act of February 13, 1925 the "failure to substitute appellant's successor" caused the action to abate.

The mandate was stayed in the Court of Appeals; Madeleine Ursula Snyder filed a motion for leave to proceed herein in forma pauperis and a petition for writ of certiorari, both of which were granted by this Court (R. 49).

Specification of Errors

The Court of Appeals erred:

(1) In holding that the validity of the District Court judgment in the case at bar was conditional upon substitution of Rear Admiral Buck's successor in the office of Paymaster General of the Navy in accordance with the provisions of the Act of February 13, 1925 and that the failure to make such substitution caused the District Court judgment to abate.

(2) In determining that principles of estoppel did not foreclose Rear Admiral Buck's attack under the Act of February 13, 1925 upon Madeleine Ursula Snyder's failure to substitute his successor.

(3) In failing to hold that Rear Admiral Buck had no right to invoke a review of the District Court judgment

after the termination of his incumbency in the office of Paymaster General of the Navy and in failing to dismiss his appeal and to remand the case to the District Court so that Madeleine Ursula Snyder could bring action on the District Court judgment.

Summary of Argument

The final money judgment which the District Court entered in the form of a mandatory injunction against Rear Admiral W. A. Buck, in his capacity as Paymaster General of the Navy, would not have abated at common law by reason of his resignation from office after the entry of the judgment.

The legislative history of the Act of February 13, 1925 shows that Congress enacted this legislation to ameliorate the harshness of the common law and did not intend thereby to add to the inequities of the common law by providing a statutory procedure for the abatement of judgments which did not abate at common law. Furthermore, the language used by Congress in enacting this statute establishes that Congress was dealing therein only with pending actions and was not concerned with causes of action which were no longer pending because of their merger in final judgments.

This Court did not hold in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra*, that the validity of a judgment, which would not have abated at common law, was made conditional upon substitution in compliance with the Act of February 13, 1925.

Moreover, the Act of February 13, 1925 has no application to the case at bar, because the Act applies only to cases in which an officer of the Government dies or is otherwise separated from office during the "pendency of an action" in a court of first instance or in an appellate tribunal. The

case at bar was not "pending" within the meaning of that word as used in the Act in either the District Court or in the Court of Appeals when Rear Admiral Buck resigned from the office of Paymaster General of the Navy on March 1, 1948.

Even if the Act of February 13, 1925 is applicable to the case at bar, principles of estoppel foreclose Rear Admiral Buck's attack upon Madeleine Ursula Snyder's failure to substitute his successor in office.

ARGUMENT

I

The District Court Judgment Would Not Have Abated at Common Law

In *Secretary* v. *McGarrahan*, 9 Wall. 298, it was held that at common law a judgment in mandamus ordering the performance of an official duty by a public officer, as if yet in office, when in fact he had gone out after service of the writ, and *before the judgment* is void, and cannot be executed against his successor. This doctrine was reaffirmed in *United States* v. *Boutwell*, 17 Wall. 604, wherein Justice Strong explained the grounds for the doctrine, namely that what the law seeks to enforce by writ of mandamus is the personal obligation of the individual to whom it addresses the writ; he alone can be punished for disobedience; and, if he be a public officer, the court cannot compel him to perform a personal duty after his power to perform has ceased by reason of his retirement from office.

However, these cases do not hold that a judgment in mandamus ordering the performance of an official duty by a public officer abated under common law, when said judgment was entered before he retired from office. Indeed, in the light of Justice Strong's reasons for holding that an

action at law for a writ of mandamus must abate when the judgment is entered against the public officer after he has retired from office, it can be seen that there is no valid ground for holding that a judgment in mandamus entered before his retirement must abate, when his power to comply with the directions of the court is not affected by his subsequent retirement.

A study of other decisions of this Court on the question of abatement at common law, including the decisions in *United States* v. *Chandler*, 122, U. S. 643; *United States ex rel. Long* v. *Lochren*, 164 U. S. 701; *Warner Stock Valley Co.* v. *Smith*, 165 U. S. 28; *United States ex rel Bernardin* v. *Butterworth*, 169 U. S. 600, does not disclose that this Court has ever held that a judgment in mandamus entered against a public officer before his death or retirement from office was in any way affected at common law by his subsequent death or retirement. None of these cases involve a judgment entered *against* an officer of the Government prior to his death or resignation from office. All of these cases, as well as the cases of *Irwin* v. *Wright*, 258 U. S. 219, *United States ex rel. Claussen* v. *Curran, supra, Matheus* v. *U. S. ex rel. Cunningham*, 282 U. S. 802; and *United States ex rel. Trinler* v. *Carusi*, 168 F.(2) 1014, which were decided under the Act of February 8, 1899, c. 121, 30 Stat. 822, 28 U. S. C. A. 780, or the Act of February 13, 1925 or a rule of court based thereon, involve the death or resignation of an officer of the Government after the action brought against him had been dismissed, that is after judgment had been entered in favor of the officer-defendant. In such cases the cause of action was not merged in the final judgment at common law. 1 C. J. S. Section 128 and 1 C. J. Section 289 and cases cited therein under Footnote 71, especially *Iron Gate Bank* v. *Brady*, 184 U. S. 665.

On the other hand, numerous decisions of other courts

support the doctrine that, at common law the death or retirement from office of a public officer-defendant after judgment had been entered against him did not abate the action because the cause of action had been merged in a final judgment which stood and would not be vacated. 1 C. J. S Section 124 and 127; 1 C. J. Section 288 and cases cited therein under Notes 65, 66.

From the foregoing it appears that, at common law the District Court judgment, which was entered on *January 30, 1948* in the form of a mandatory injunction against the defendant, Rear Admiral Buck, Paymaster General of the Navy, and which directed the defendant to pay plaintiff $1,365.00, would not have abated by reason of his retirement from office on *March 1, 1948*. Certainly, his retirement from the office of Paymaster has not affected his power to comply with the directions of the District Court and has not made it impossible for him to perform the personal duty the mandatory injunction seeks to enforce, to wit, the payment by him of a money judgment in the amount of $1,365.00.

Furthermore, Rear Admiral Buck cannot be heard to say that it would be an unjust penalty to compel him to make this payment from his own pocket, for he had ample time from the date of the entry of judgment, January 30, 1948, to the date of his resignation from office March 1, 1948, to make payment from the funds provided by Congress for this purpose, or to otherwise protect himself from the consequences of his failure to comply with the mandatory injunction.

II

The Act of February 13, 1925 Does Not Cause Abatement of Judgments Which Did Not Abate at Common Law

In *United States ex rel. Bernardin* v. *Butterworth, supra*, this Court held that at common law a suit for a writ of

mandamus to compel the Commissioner of Patents to issue a patent abates by the death of the Commissioner and cannot be revived so as to bring in his successor, although the latter gives his consent. At the conclusion of its opinion, this Court said:

> "In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, *in the case of suits against the heads of departments abating by death or resignation,* it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

As suggested by this Court, Congress provided for this difficulty by enacting the Act of February 8, 1899, 30 Stat. 822, 28 U. S. C. A. 780. *Murray* v. *Utter,* 186 U. S. 95, 46 L. Ed. 1070, 22 S. Ct. 776.

When this Court suggested that "it would *promote justice* to enlarge the scope of the Act of February 8, 1899 so as to permit the substitution of successors for state officers suing or sued in the federal courts, who cease to be officers by retirement or death," Congress so amended the Act by the Act of February 13, 1925. *Irwin* v. *Wright,* 258 U. S. 219, 66 L. Ed. 573, 42 S. Ct. 293.

The motivation behind this legislation makes it evident that Congress only intended thereby to ameliorate the harshness of the common law, by providing a statutory procedure to avoid the abatement of those causes of action brought by or against public officers which abated at common law by reason of their death or resignation. Certainly, it was not the intent of Congress to *promote injustice* by adding to the inequities of the common law a statutory procedure for the abatement of those causes of action, which were no longer *pending* because of their merger in final

judgments against public officers and which for this reason did not abate at common law upon the public officer's subsequent death or retirement.

From the foregoing it becomes apparent that the language used by Congress in the Act of February 13, 1925 must be carefully interpreted in the light of the intent Congress had in enacting this legislation and in enacting the Act of February 8, 1899 which it amended. By the language of the amendment Congress authorized the Court wherein the action is *pending*, to permit a cause of action to be continued and maintained "where during the *pendency of an action*, suit, or other proceeding * * * such officer dies, resigns, or otherwise ceases to hold office * * *". This language leaves no doubt that Congress was dealing in this legislation only with *pending actions* and that the Act did not encompass a cause of action which was no longer pending because of its merger in a final judgment. On the basis of this proper interpretation, it may be stated with assurance that the language used by Congress in the Act of February 13, 1925 does not compel a result contrary to the intent of Congress in enacting this legislation and that the Act does not cause abatement of judgments which did not abate at common law.

III

This Court Did Not Decide in Defense Supplies Corp. v. Lawrence Warehouse Co. That the Act of February 13, 1925 Causes Abatement of Judgments Which Did Not Abate at Common Law.

Upon the authority of this Court's opinion in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra*, "particularly that part of the opinion dealing with *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590 (1928)", the United States Court of Appeals for the District of Columbia Circuit held the case at bar had abated and that the judgment

of the District Court entered prior to Rear Admiral Buck's resignation from office must be vacated. In so holding the Court of Appeals misinterpreted and did not give proper effect to applicable decisions of this Court.

In the light of the motivating force behind the Act of February 8, 1899, it is evident that when Congress provided therein "no action shall abate", it was referring *to those actions which at common law abated* by reason of the death or resignation of an officer of the United States. By that Act Congress precluded such common law abatement and authorized the Court to allow the action "to be maintained by or against his successor in office" if within 12 months after the death or resignation of the officer of the United States "a necessity for the survival thereof" was shown by a motion or supplemental petition. This Court so interpreted that Act in *LeCrone* v. *McAdoo*, 253 U. S. 217, for in that case it was held that although the action could not be continued in this Court when the required substitution had not been accomplished and "the year given for substitution had expired", nevertheless, the judgments of the District Court and Court of Appeals did not abate. Since the judgments of the District Court and Court of Appeals were rendered for the defendant and dismissed the plaintiff's petition and denied the writ of mandamus prayed for therein, they were judgments which would have abated at common law even though rendered prior to Mr. McAdoo's resignation from the Office of Secretary of the Treasury. This is so, for as shown above the cause of action in this Court was that on which the suit was originally founded, inasmuch as the nature of the judgments below did not enable the cause to be merged therein.

In the light of the motivating force behind the amendment to the Act of February 8, 1899, it is evident that when Congress enacted the Act of February 13, 1925 and omitted the

command "no action shall abate" it was again referring to those actions, which at common law abated by reason of the death or resignation of an officer of the United States or of an officer of a state of the United States. By the amendment Congress provided that such common law abatement could only be precluded by strict compliance with the remedial procedure provided in the amendment, namely the substitution of his successor in office within 6 months after his death or separation from office. This Court so interpreted the amendment in *United States ex rel. Claussen* v. *Curran, supra,* for in that case it was held that because of the failure to substitute Curran's successor in office within 6 months after Curran's resignation, the District Court judgment for defendant Curran, which dismissed the plaintiff's petition and denied the writ of habeas corpus prayed for therein had abated although it was entered prior to Curran's resignation. As explained above the District Court judgment in the *Curran* case was one that would have abated at common law and would not have abated under the Act of February 8, 1899. As fully explained in Point II of this brief, the Act of February 13, 1925 did not go so far as to cause abatement of judgments which did not abate at common law. Accordingly, by pointing out in the *Defense Supplies Corp.* case that it had vacated the judgment rendered by the District Court in the *Curran* case because the Act of February 13, 1925 "made it unmistakably clear that the validity of the judgment was conditional upon substitution" this Court may not properly be held to have decided that the Act of February 13, 1925 makes the validity of judgments which did not abate at common law "conditional upon substitution." The Court of Appeals for the District of Columbia Circuit erred in so holding.

In *Bowles* v. *Wilke,* 175 F. (2d) 35, the Court of Appeals for the 7th Circuit commented upon the decision in *North-*

western Lumber and Shingle Co. v. *U. S.*, 170 F. (2d) 692, and in so doing correctly construed the decision of this Court in the *Defense Supplies Corp.* case. In the *Northwestern* case, Paul A. Porter, Price Administrator, had obtained a money judgment against the Lumber and Shingle Company for violation of price regulations, including Section 9 of Revised Maximum Price Regulation No. 164. However, in accordance with a stipulation entered into between the parties, execution on the judgment was stayed until the final determination of *Reser* v. *Fleming*, 160 F. (2d) 378. On December 12, 1946 Porter was succeeded in office by Philip B. Fleming. The issues in *Reser* v. *Fleming, supra,* were finally determined within six months of the aforesaid succession in office, but no motion was made under Paragraph (d) of Rule 25 of the Federal Rules of Civil Procedure to make substitution for Porter as the party plaintiff in the *Northwestern* case. Accordingly, the Lumber and Shingle Co. moved to dismiss the judgment against it as abated, but the Court held that noncompliance with Rule 25(d) would not abate the action.[2] The Court of Appeals for the 7th Circuit in *Bowles* v. *Wilke, supra,* upon the authority of the Supreme Court's decision in the *Defense Supplies Corp.* case, reached the conclusion that the decision on the abatement question in the *Northwestern* case was correct, because the judgment there was valid when entered and remained valid irrespective of anything that happened thereafter. It is submitted that that conclusion was correct because the nature of the judgment in the *Northwestern* case was such that it merged the cause of action therein.

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[2] Rule 25(d) and Section 11 of the Act of February 13, 1925 are identical insofar as the issues involved in the *Northwestern* case and the case at bar are concerned.

IV

In Any Event the Act of February 13, 1925 Is Not Applicable to the Case at Bar

If it is assumed *arguendo*, that the Act of February 13, 1925, goes so far as to make the validity of any judgment, including a judgment which did not abate at common law, conditional upon substitution when the case of which such judgment is a part continues to be a *pending* one in a court of first instance or in an appellate tribunal, nevertheless the Act is not applicable to the case at bar. This is true, because the case at bar was not *pending* either in the District Court or in the Court of Appeals when Rear Admiral Buck resigned from office on March 1, 1948 and it was not *pending* in either court at any time after his resignation.

In *Davis* v. *Preston*, 280 U. S. 406, 74 L. Ed. 514, 50 S. Ct. 171, this Court held that a writ of certiorari to review a judgment recovered against a public officer in his official capacity, petitioned for by him after termination of his incumbency, must be dismissed as having been improvidently granted, all right to complain of the judgment, or discretion to invoke a review of it, having passed to his successor in office. This Court also held therein that the successor in office of a public officer against whom a judgment has been recovered may not be substituted for him as petitioner for a writ to review such judgment, where the writ was sued out after the succession in office, and the time within which review may be invoked has expired. The *Davis* case doctrine was reaffirmed by this Court in *Nudelman* v. *Globe Varnish Company*, 312 U. S. 690, 85 L. Ed. 1126, 61 S. Ct. 621.

It follows that when Rear Admiral Buck resigned from the office of Paymaster General of the Navy on March 1, 1948 and was succeeded in that office on that date by Rear

Admiral Foster, all right to complain of the District Court judgment of January 30, 1948 against Rear Admiral Buck in his official capacity and the discretion to invoke a review of such judgment on appeal passed to the successor, Rear Admiral Foster. Also, it follows that when the Notice of Appeal was filed by Rear Admiral Buck on March 18, 1948, 18 days after the succession in office, he had no authority to invoke an appeal and since no motion to substitute his successor in office as the appellant was made until March 18, 1949, long after the statutory period had expired within which review on appeal could be invoked, the Court of Appeals could not grant the motion. Therefore, no valid appeal from the District Court judgment was ever filed in the Court of Appeals.

The foregoing establishes beyond a shadow of a doubt that Rear Admiral Buck did not resign from the office of Paymaster General of the Navy "during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States * * * [in] an appellate tribunal" and, insofar as the application of the Act of February 13, 1925 is limited to "*pending*" proceedings in an appellate tribunal, the Court of Appeals erroneously decided that said Act required the abatement of "the District Court judgment on appeal" and that the abatement robbed the District Court judgment of its vitality. Obviously, since there never was an appeal in the case at bar, there were no appellate proceedings which could abate.

It also appears that Rear Admiral Buck did not resign from office "during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States * * * [in] a court of first instance". As previously mentioned the judgment of the District Court was entered on *January 30, 1948* and Rear Admiral Buck did not resign from office until *March 1, 1948*. This judgment in the form of a mandatory injunction became final

on the date of its entry, for the District Court did not stay the judgment. Rule 62(a) Federal Rules of Civil Procedure. Even if the judgment had been stayed, the stay would have been conditional upon perfecting the appeal. *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* and as shown above an appeal from the final judgment was never taken.

Black's Law Dictionary (Second Edition) defines "pending" as follows:

> "Begun but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus an action or suit is said to be pending from its inception *until the rendition of a final judgment.*"

If Congress did not in the Act of February 13, 1925 use the word "*pending*" in the common law connotation explained in Point II of this brief, then it must have used the word with the meaning given to it by Black. For it is difficult to conceive that after the rendition of a final judgment by the District Court, that there could be a substantial need for "obtaining an adjudication of the questions involved" in the District Court.

If the Act of February 13, 1925 is Applicable to the Case at Bar, Principles of Estoppel Foreclose Respondent's Attack upon the Failure to Substitute.

If it is assumed *arguendo* that at the time Rear Admiral Buck resigned from the office of Paymaster, the case at bar was "a pending action" within the meaning of the Act of February 13, 1925, nevertheless it does not follow that the District Court judgment must be vacated. For in Footnote 10 to its opinion in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* this Court stated:

> "The view we take of this case makes it unnecessary to decide whether principles of estoppel might not

foreclose respondent's attack upon the failure to substitute."

All of the opinions of this Court which are reviewed herein and the footnote quoted above, make it clear that this Court has not decided the question whether principles of estoppel might foreclose an attack upon the failure to substitute within the time specified in the Act of February 13, 1925. In applying this statute of the United States to the case at bar, the United States Court of Appeals for the District of Columbia Circuit decided this question in the negative. A Statement of the pertinent facts in the case, without any supporting argument, is sufficient to establish that the question is one of substance which should be settled by this Court.

The District Court final judgment, in the form of a mandatory injunction, was entered on *January 30, 1948*. Without actual or constructive notice to Madeleine Ursula Snyder, Rear Admiral Buck resigned from the office of Paymaster General of the Navy on *March 1, 1948* and was succeeded on that date by Rear Admiral Foster. On *March 18, 1948*, 18 days after he had resigned from the Office of Paymaster and had lost his right of appeal in the capacity of Paymaster, Rear Admiral Buck purported to note and subsequently perfect an appeal as Paymaster General of the Navy and thereby wilfully misled the Courts and Madeleine Ursula Snyder to believe that he continued to hold the office of Paymaster.

The Court of Appeals scheduled the oral argument on the merits of this appeal for *March 18, 1949*. On that date Rear Admiral Buck disclosed the deception he had successfully carried out for one year. He contended that as a result of Madeleine Ursula Snyder's failure to substitute his successor in office, which failure was brought about by his deception, the District Court judgment, which was valid when

entered and which was entered while Rear Admiral Buck occupied the office of Paymaster, was robbed of its vitality by the abatement of appellate proceedings. Madeleine Ursula Snyder contended that principles of estoppel foreclosed Rear Admiral Buck's attack upon her failure to substitute his successor in office. The Court of Appeals rejected this contention and held that her failure to substitute his successor in office caused the case to abate and directed the District Court to vacate its judgment.

In *Galt* v. *Phoenix Indemnity Co.*, 74 App. D. C. 156, 120 F. (2) 723, the United States Court of Appeals for the District of Columbia Circuit quoting from the decision of this Court in *Davis* v. *Wakelee*, 156 U. S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555, 558 had this to say about the doctrine of equitable estoppel:

> "* * * where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. "* * * and, in order that the rule shall operate, it is necessary that the parties be the same, and the issues the same. In addition, the party urging the estoppel 'must show that he has done something or omitted to do something in reliance upon the other party's conduct by which he will now be prejudiced if the facts are shown to be different from those upon which he relied' * * * Where the parties have equal knowledge or opportunity of knowledge, or where the facts are known equally to both, or both have equal means of ascertaining them, there can be no estoppel."

An examination of the facts in the case at bar in the light of the definition given to "equitable estoppel" by the Court of Appeals in the *Galt* case, discloses that all of the elements of equitable estoppel are present here. It

therefore follows that the Court of Appeals must have determined that, principles of estoppel may not foreclose an attack upon the failure to substitute within the time specified by the Act of February 13, 1925. It is respectfully submitted that if for no other reason than *in the interest of justice*, this Court should determine that principles of estoppel may foreclose an attack upon the failure to substitute within the time specified by the Act of February 13, 1925 and that such principles do foreclose Rear Admiral Buck's attack upon Madeleine Ursula Snyder's failure to substitute his successor in office.

VI

28 U.S.C.A. 2105 Does Not Preclude Reversal by This Court of the Error Committed by the Court of Appeals in Ruling upon the Abatement Question.

In Rear Admiral Buck's brief in opposition to the granting of the petition for a writ of certiorari herein, he contended that the Act of June 25, 1948 c. 646, 62 Stat 963, 28 U. S. C. A. 2105, prevents review by this Court of the decision of the Court of Appeals on the abatement question involved herein. That Act provides:

> "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling on matters in abatement which do not involve jurisdiction."

The short answer to Rear Admiral Buck's contention is found in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* in which this Court, on April 18, 1949, reversed an error made by the Court of Appeals for the 9th Circuit in ruling upon matters in abatement. In the *Defense Supplies Corp.* case this Court said:

> "We have held, above, that the Court of Appeals had no jurisdiction to review the merits. LeCrone and

> Payne show that we likewise had no jurisdiction so far as the merits are concerned. But that, of course, does not affect our power to set aside the erroneous action of the Court of Appeals. Our supervisory appellate jurisdiction would be of little value if the injustice caused by the decision below were to stand uncorrected. We are not so constricted."

Furthermore, the decisions of this Court in *Davis* v. *Preston, supra,* and *Nudelman* v. *Globe Varnish Co. supra* show that the Court of Appeals had no jurisdiction to rule upon matters in abatement in the case at bar. Accordingly, the error made by the Court of Appeals in ruling upon the matters in abatement herein does involve the jurisdiction of the Court of Appeals and 28 U. S. C. A. 2105 is not applicable.

VII

This Court Should Vacate the Judgment of the Court of Appeals and Remand to that Court With Directions to Dismiss the Appeal from the Judgment of the District Court.

In Rear Admiral Buck's brief in opposition to the granting of a petition for writ of certiorari herein, it is contended that this is not the type of case in which the Supreme Court should exercise its supervisory appellate jurisdiction in order to reverse the error made by the Court of Appeals in ruling upon the question of abatement, because such action would simply result in having the case remanded to the Court of Appeals for a decision on the merits and because the Court of Appeals has in a companion case, *United States* v. *Snyder,* 177 F. (2d) 44, decided issues on the merits adversely to Madeleine Ursula Snyder. This contention has no foundation either in law or in fact.

Since Rear Admiral Buck filed notice of appeal from the District Court judgment after termination of his incum-

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 64

MADELEINE URSULA SNYDER, PETITIONER

v.

REAR ADMIRAL W. A. BUCK,
PAYMASTER GENERAL OF THE NAVY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 26-36) is reported at 75 F. Supp. 902. The *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit (R. 46), vacating the judgment of the district court and directing the dismissal of the complaint as abated, is reported at 179 F. 2d 466.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was en-

[1] An earlier opinion of the court of appeals in a companion case involving the same issues on the merits, not reached in the instant action, is reported at 177 F. 2d 44. See *infra*, pp. 7-8.

tered on November 16, 1949 (R. 46). The petition for a writ of certiorari was filed on December 30, 1949, and was granted on May 8, 1950 (R. 49). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). For the reasons set forth in Point II, infra, pp. 43-46, we suggest that there may be no jurisdiction over this case.

QUESTIONS PRESENTED

1. Whether the failure to substitute a successor Paymaster General of the Navy, within six months after he takes office, as required by Section 11 of the Judiciary Act of 1925, abates a mandatory injunction action against his predecessor, where the six-month period began after a district court judgment had been entered against the predecessor and ended while an appeal was pending from that judgment.

2. Whether the decision of the court below is a ruling in abatement which 28 U. S. C. 2105 precludes this Court from reversing.

STATUTES INVOLVED

Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941)[2] provides in pertinent part:

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[2] Section 11 was repealed as of September 1, 1948 (62 Stat. 992, 1000). That date coincides with the date on which the six-month statutory period for substitution in this case expired, that is, six months after Rear Admiral Buck's retirement on March 1, 1948 (R. 45). The repealing Act expressly preserved any rights or liabilities existing under any of the laws repealed by that Act (62 Stat. 869, 992). The repeal

SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

* * * * *

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

28 U.S.C. 2105 (62 Stat. 963) provides:

Scope of Review; abatement. There shall be no reversal in the Supreme Court or a court

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of Section 11 does not, therefore, appear to affect the instant case.

bency in the office of Paymaster General of the Navy and since his successor in office did not move to be substituted for Rear Admiral Buck as appellant until long after the time within which the appeal could be taken, the Court of Appeals was without jurisdiction to review the merits of the cause and reversal of its decision on the abatement question cannot give it such jurisdiction. *Davis* v. *Preston, supra, Nudelman* v. *Globe Varnish Co., supra.*

In answer to the same or similar contentions in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* this Court said:

> "Three conclusions follow * * *. The first is that the Court of Appeals was without jurisdiction to review the merits of the cause, since respondents called for review after the period given for substitution had expired. In addition, the District Court judgment was valid when entered, since it was entered during the one year period. And finally the judgment was not robbed of its vitality by the abatement of appellate proceedings."

Having reached these three conclusions the Supreme Court thereupon vacated the judgment of the Court of Appeals in the *Defense Supplies Corp.* case and remanded to that Court with directions to dismiss the appeal from the judgment of the District Court, so that action could be brought on the District Court judgment. It is evident that that is the procedure that this Court will direct in the case at bar.

Furthermore the decision of the Court of Appeals in *United States* v. *Snyder, supra,* did not decide the issue on the merits in the case at bar. In *United States* v. *Snyder, supra,* the Court of Appeals simply decided that Madeleine Ursula Snyder was not the *de jure* wife of Charles R. Snyder, deceased, and that therefore she was not within the restricted class of beneficiaries permitted by the National

Life Insurance Act. While the District Court held in the case at bar that the petitioner was the *de jure* wife of the decedent and therefore qualified for the death gratuity of the Act of May 22, 1928, 34 U. S. C. A. 943, there was a substantial question, which was briefed by both parties in the Court of Appeals, as to whether the Act of May 22, 1928 authorized the payment of the death gratuity to Madeleine Ursula Snyder because of her mere "relationship" as *de facto* wife of the decedent. Accordingly, it appears that Rear Admiral Buck is not even justified in asserting that if the Court of Appeals had jurisdiction to decide the case at bar on its merits, it would decide the issues against Madeleine Ursula Snyder.

Conclusion

For the foregoing reasons it is respectfully submitted that this Court, in the exercise of its supervisory appellate jurisdiction, should correct the injustice caused by the decision below by vacating the judgment of the Court of Appeals and remanding the case to that Court with directions to dismiss the appeal from the judgment of the District Court so that Madeleine Ursula Snyder may bring action on the District Court judgment.

Respectfully submitted,

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1 C. J. [pp. 169-170], Sections 288-289 27
1 C. J. S. [pp. 172, 174], Sections 124, 127 27
Federal Rules of Civil Procedure:
Rule 25(d) 6, 40
General Rules of the Court of Appeals for the District of Columbia Circuit:
Rule 28(b) 6
H. R. 6901, 55th Cong., 2d sess. 19
H. R. 8206, 68th Cong., 2d sess. 21
H. Rep. No. 960, 55th Cong., 2d sess. 20
H. Rep. No. 1075, 68th Cong., 2d sess., pp. 2, 8 21
S. 2060, 68th Cong., 2d sess. 21

peal would be frustrated, and the court would be prevented from giving "judgment as the right of the cause shall appear to it." *Hoiness* v. *United States*, 335 U.S. 297, 300-301.

I

Abatement of this entire action could have been avoided only by the timely substitution of Rear Admiral Buck's successor, as required by Section 11 of the Judiciary Act of 1925

The history and purpose, as well as the language, of Section 11 of the Judiciary Act of 1925, *supra*, p. 3, establish that an action for a writ of mandamus or a mandatory injunction, whether or not reduced to judgment, abates upon the expiration of six months after the death or resignation of a public officer defendant, unless a proper substitution of the successor has been made within that time. Moreover, the decisions of this Court interpreting Section 11 and antecedent enactments show that such actions abate (1) whether the resignation of the public officer occurred before or after judgment was entered by the trial court, and (2) whether that trial court judgment was in favor of, or against, the resigned officer. These considerations, we submit, justify an affirmance of the decision below. It is significant that such an affirmance here, while defeating the action for the present, does not bar petitioner from commencing it against the proper defendant.

of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

STATEMENT

In 1937 petitioner married one James John Ford in Pennsylvania (R. 12-13). They lived together as husband and wife in New Jersey until November 15, 1944, when they separated, and they did not live together thereafter (R. 13). In May 1945, a decree of divorce purporting to dissolve their marriage was entered in a court in Chihuahua, Mexico (R. 13). Neither petitioner nor Ford were residents of, or domiciled in, Mexico at the time of or prior to the entry of the decree; all negotiations leading up to the entry of the decree were handled through correspondence with attorneys in Mexico (R. 13).

On July 3, 1945, at Elkton, Maryland, petitioner participated in a marriage ceremony with Charles Richard Snyder, who was in the naval service and a resident of New Jersey (R. 13-14). Shortly thereafter, Snyder designated petitioner as principal beneficiary and his sister, Dorothy Helen Reul, as contingent beneficiary for the six-month gratuity allowance payable by the United States upon his death in the service (R. 24). Petitioner and Snyder lived together in New Jersey until March 10, 1946, when Snyder, who was still in the service, died (R. 14).

After Snyder's death both petitioner and Dorothy Helen Reul filed claims with the Navy Department for the death gratuity allowance, amounting

to $1,365.00, the equivalent of six months pay at the rate earned by Snyder at the time of his death (R. 24-25). The Navy Department ruled that petitioner's Mexican mail-order divorce had been legally ineffective to dissolve her marriage to Ford, so that she never had become the legal wife of Snyder and therefore was not his legal widow, and hence, not entitled to the death gratuity under the Act of June 4, 1920 (41 Stat. 824, as amended, 34 U.S.C. 943). Instead it paid the gratuity to his sister, in accordance with the 1920 Act (R. 5, 25).

Petitioner, claiming to be the lawful widow of the deceased serviceman, then instituted the instant action in the United States District Court for the District of Columbia against "Rear Admiral W. A. Buck, S. C., U. S. N., Paymaster General of the Navy, Defendant." Her suit took the form of a "Petition in the nature of mandamus to compel [the] Paymaster General of the Navy to pay widow's allowance." (R. 1-2). On January 29, 1948, the district court, deciding that petitioner was entitled to the death gratuity, overturned the Navy Department's ruling and, while observing that a writ of mandamus would be improper, nevertheless issued a mandatory injunction against Buck as Paymaster General.[3] The injunction di-

[3] The district court recognized that it had no authority to issue a writ of mandamus in this case, since the duty which the suit sought to have performed was not wholly ministerial. It held, however, that Section 10 of the Administrative Procedure Act (60 Stat. 237, 243; 5 U. S. C. 1009) created a

rected him to pay petitioner the six-month death gratuity in the amount of $1,365.00 (R. 39, 40-41). On March 18, 1948, notice of appeal from the district court judgment was filed in the name of Rear Admiral Buck as Paymaster General (R. 41).

Prior to the filing of that notice and on March 1, 1948, Rear Admiral Buck had been retired and had been succeeded in office on that date by Rear Admiral Edwin D. Foster as the new Paymaster General (R. 44). Rear Admiral Foster's nomination to the office of Paymaster General had previously been confirmed by the Senate on February 18, 1948, for a four-year term (R. 44). Petitioner made no effort to have the succeeding Paymaster General substituted for Rear Admiral Buck within six months after the latter had vacated that office, as provided by Section 11 of the Judiciary Act of 1925, *supra*, p. 3, which had been incorporated into Rule 28(b) of the General Rules of the Court of Appeals for the District of Columbia Circuit.[4] In the court of appeals, the Government

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remedy and authorized the issuance of a mandatory injunction (R. 32). In the court below, the Government urged that the district court erred in invoking the Administrative Procedure Act, since the Tucker Act (28 U. S. C. 1346(a)) provides a judicial remedy for recovering death gratuities.

[4] Rule 28(b) expressly provided that "the matter of abatement and substitution is covered by Section 11 of the Act of February 13, 1925, c. 229 [43 Stat. 941]." Subsequent to the repeal of Section 11 (*supra*, p. 3, note 2), Rule 28(b) was amended so as to delete the reference to Section 11 and substitute a reference to Rule 25(d) of the Federal Rules for Civil Procedure. 84 App. D. C. IX-X.

attorney called these facts to the court's attention, but suggested that it had no desire to have the cause abated because of petitioner's failure to comply with Section 11 (R. 45-46). The court below, nevertheless held that the action had abated because of the failure to substitute Rear Admiral Foster within the statutory six-month period (R. 47). Consequently, without passing on the merits of the case, the court ordered that the judgment of the district court be vacated as abated, relying on that portion of this Court's opinion in *Defense Supplies Corp.* v. *Lawrence Co.*, 336 U. S. 631, which discusses *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590 (R. 47).

Petitioner had also instituted a separate action against the United States in order to reverse a Veterans' Administration decision, which, because of the invalid Mexican mail-order divorce, held her ineligible to receive National Service Life Insurance proceeds of a policy in which Snyder had designated her as the principal beneficiary and his sister as contingent beneficiary. The same district judge who awarded the mandatory injunction in the present case sustained her contention that she was the widow of the insured for the purpose of receiving National Service Life Insurance benefits and entered judgment in her behalf in that case as well. On appeal, the Court of Appeals for the District of Columbia Circuit reversed, holding that the invalid Mexican mail-order divorce pre-

vented petitioner from becoming the lawful wife of the insured, and, in effect, directed that the insurance proceeds be paid to Dorothy Helen Reul. *United States* v. *Snyder,* 177 F. 2d 44. Petitioner did not seek review of that decision of the court of appeals, which was handed down on July 5, 1949.

SUMMARY OF ARGUMENT

The Government has no desire that this case be abated. In the court below Government counsel suggested that the case fell within the ambit of this Court's decisions in *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, 426, and *Hiatt* v. *Smith,* 336 U. S. 908, since a retired admiral may be called back to active service and that the court below might therefore find that the case had not abated. There may be doubt however that the *Volpe* and *Hiatt* cases apply to a Paymaster General of the Navy, whose appointment must be confirmed by the Senate. If, on the other hand, this Court should consider that the cause has not abated, we suggest that the present Paymaster General, Rear Admiral Charles W. Fox, be substituted as party respondent, and that the decision be reversed and the case remanded for consideration of the merits. Otherwise, we submit that the decision of the court below is correct.

I

A. Early in the history of writs sued out against federal officers it was established by this Court that suits of that character abate upon the death or

resignation of the officer, and that, in the absence of a proper statute, the successor officer could not be substituted even with his own consent. The reason behind the rule was that the officer was powerless to perform the duty after he left the office, and the court could not compel him to perform after his power to perform had ceased. And the successor could not be substituted, since the substitution would, in effect, be the institution of an original suit in the appellate court.

In 1899, Congress enacted a statute expressly providing that such suits should not abate and that the successor officer might be substituted within twelve months.

B. In 1925, the 1899 provision was superseded by Section 11 of the Judiciary Act of that year. The new statute eliminated the provision that "no action should abate" upon the death or resignation of a public officer, but provided that the action might be continued if the successor should be substituted within six months after the death or resignation.

C. Under the 1899 Act this Court held that where no substitution had been made within the statutory period of twelve months the action could not be continued, but merely dismissed the proceeding in this Court without disturbing the judgment of the trial court. After the passage of the 1925 Act, which eliminated the provision that no action should abate, this Court held that in the absence of proper substitution the entire proceed-

ing abated, including the judgment of the trial court. Accordingly, this Court adopted the practice of directing the trial court to vacate the judgment and dismiss the suit as abated.

1. (a) Petitioner's contention that a judgment in mandamus entered against a public officer prior to his death or resignation did not abate at common law is erroneous. The cases upon which she relies relate to suits in assumpsit brought against collectors of the revenue to recover taxes erroneously collected. Those suits were brought for money judgments and the collectors were liable personally to pay the judgments recovered. Moreover, the judgment recovered in such suits could be revived against the legal representatives of the deceased and collected from the collector's estate. Actions for mandamus, however, seek only a coercive remedy against the public officer defendant. In such suits, the court may order him to perform a duty, which may include the payment of money, but the officer is not liable in his estate for the payment. The writ of mandamus does not reach the office, but only the individual. Since the officer can perform the duty only so long as he holds the office, the court cannot coerce him to pay after he has left it.

(b) Petitioner asserts that none of the decisions of this Court on abatement involved a judgment entered *against* a public officer. However, this Court has stated that the *writ* of mandamus abates

upon the death or resignation of the officer. *United States* v. *Boutwell,* 17 Wall. 604, 607. Another decision of this Court reversed a court of appeals' decision directing the trial court to release a relator in a habeas corpus proceeding. *Matheus* v. *United States ex rel. Cunningham,* 282 U. S. 802. And the reason for abatement is as forceful where the judgment is entered against the officer as where it is in his favor.

In reality, the reason behind the abatement is that the case is moot, since after the death or resignation there is no longer any subject matter on which the court can act. It has long been the practice of this Court in moot cases to order the judgment of the trial court vacated and the proceeding dismissed.

2. Petitioner's contention that there was no action pending because the action merged into the judgment, and because there was no valid appeal taken, is without merit. The entry of a trial court judgment does not mean that there is no longer a case pending. The cause is still pending until the judgment is satisfied.

The contention that no valid appeal was taken is plainly inconsistent with petitioner's further contention that respondent is personally liable to pay the judgment. If he has liability to pay, he must have had a sufficient interest to warrant his taking an appeal. *Davis* v. *Preston,* 280 U. S. 406, is inapposite. Davis was agent for the purpose of

the suit. When he ceased to be agent he had no further authority. He was, therefore, denied the right to take an appeal, but he was not held liable for the judgment. If the instant case did not become moot by reason of his retirement, respondent was liable to coercive action by the trial court, and consequently had sufficient interest to take the appeal.

3. Petitioner has no ground for estoppel. The appointment of respondent's successor in office was a matter of public record. She had ample opportunity to ascertain the facts. In any event, the taking of the appeal in respondent's name was obviously not a deception.

D. The abatement of the judgment does not leave petitioner without a remedy. She may bring a new action against the present Paymaster General, or she may bring an action against the United States under the Tucker Act (28 U.S.C. 1346(a)).

E. Should this Court hold that the case abated, affirmance is proper. Should it hold to the contrary, the case should go back to the court of appeals for a decision on the merits. Petitioner's request that in the event of reversal, the remand should direct the court below merely to dismiss the appeal, letting the judgment stand, is inconsistent with her assertion that respondent had no right to appeal because of his retirement, since she claims that he is liable to pay the judgment. If any controversy remains with respondent, he obviously had a right to take the appeal.

II

28 U.S.C. Section 2105 may preclude this Court from reversing the ruling below, since it provides:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

This provision can be construed as inapplicable on the ground that abatement for failure to substitute involves jurisdiction. But if *Bowles* v. *Wilke*, 175 F. 2d 35 (C.A. 7), certiorari denied, 338 U. S. 861, is good law, this Court lacks jurisdiction to reverse the decision below.

ARGUMENT

At the outset of our discussion, we wish to make it clear that we have no desire that this case be abated. In the court below government counsel pointed out that since Rear Admiral Buck's successor had not been substituted in the case within the statutory six-month period, a question of abatement had arisen. Government counsel further pointed out that because Rear Admiral Buck was in a retired status, he might be called back to active service by the Secretary of the Navy. It was, therefore, suggested that the case at bar was within the ambit of this Court's decisions in *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 426, and *Hiatt* v. *Smith*, 336 U.S. 908, and that the court below might appropriately hold, on the authority of those cases, that the case had not abated, and

it was requested that Rear Admiral Buck's successor be substituted in his place (R. 44-46). The court below declined to follow that request.

There may, of course, be some doubt whether this case falls within the *Volpe* and *Hiatt* cases, since a naval officer appointed as Paymaster General of the Navy must be confirmed by the Senate (34 U.S.C. 11). Consequently, even if the Secretary of the Navy should call Rear Admiral Buck back to active duty, it is not entirely clear that he could legally perform any of the duties of the office of the Paymaster General of the Navy without a further appointment by the President and confirmation by the Senate. On the other hand, it may not be illogical to say that the Secretary might legally call him back to active service as Paymaster General for the purpose of completing, *nunc pro tunc*, an unfinished duty which he had been ordered by the court to perform a short time prior to his retirement. Accordingly, if this Court should consider that the cause has not abated, the Government respectfully requests, in order that the caption of the case may reflect the present situation, that the present Paymaster General of the Navy, Rear Admiral Charles W. Fox,[5] be substituted as party respondent in this Court in the place of Rear Ad-

[5] We are advised by the Department of the Navy that Rear Admiral Charles W. Fox entered on duty as Paymaster General of the Navy on October 4, 1949, he having been confirmed by the Senate for appointment to that post on September 8, 1949, for a term of four years. See 95 Cong. Rec. 12731.

miral W. A. Buck; and that this brief be treated as a motion for that purpose. Should this Court deem it appropriate to make the substitution, it is suggested that the judgment of the court below be vacated, and the cause remanded to that court for a decision on the merits of the case.

In the event this Court should deem that the substitution suggested above is unauthorized or inappropriate, the first question for discussion is whether, in the circumstances of this case, Section 11 of the Judiciary Act of 1925, *supra*, p. 3, authorized the court below to abate the proceeding and vacate the mandatory injunction issued against Rear Admiral Buck prior to his retirement from active service, because his successor, Rear Admiral Foster, was not substituted in his place as defendant within the six-month period provided in that section. We believe that the language and history of Section 11 and the principles adopted by this Court and other courts in interpreting that section, furnish ample support for the action taken by the court below. We submit, therefore, that, in the absence of timely substitution, the decision of the court below is correct and should be affirmed. Should this Court disagree with our contention and reverse the decision of the court below, it should not, as petitioner urges, merely direct the court of appeals to dismiss the appeal. In the event of reversal, the remand should direct that the court of appeals consider the case on the merits. Otherwise, the right of ap-

A. *The legislative Background of Section 11.*

Early in the history of writs sued out against federal officers to compel performance of official acts, it was established that the death, resignation, or expiration of the term of office of the defendant *pendente lite* compelled the action to abate and forced the plaintiff to sue out another writ against the new incumbent. Over 80 years ago this Court, in a suit against a Secretary of the Interior, recognized that "when he resigned, of course the suit abated." *The Secretary* v. *McGarrahan,* 9 Wall. 298, 313. This ruling was uniformly followed in all other cases reaching this Court concerning the same question. *United States* v. *Boutwell,* 17 Wall. 604, 609; *Commissioners* v. *Sellew,* 99 U. S. 624, 626; *United States* v. *Schurz,* 102 U. S. 378, 408; *Thompson* v. *United States,* 103 U. S. 480, 484; *United States* v. *Chandler,* 122 U. S. 643; *United States ex rel. The International Contracting Company* v. *Lamont,* 155 U.S. 303, 306; *United States ex rel. Long* v. *Lochren,* 164 U. S. 701. And, as early as 1897, this Court noted that the principle of abatement because of resignation from office had already "for years been considered as so well settled that in some of the cases no opinion has been filed and no official report published." *Warner-Valley Stock Co.* v. *Smith,* 165 U. S. 28, 31.

The reason for this common law rule is evident. Resignation from office means that the officer "no longer possesses the power" to perform the official act demanded of him. *The Secretary* v. *McGarra-*

han, 9 Wall. 298, 313. Since his duty to perform that act "exists only so long as the office is held, the court cannot compel [him] to perform it after his power to perform has ceased." *United States* v. *Boutwell,* 17 Wall. 604, 608.

Nor could the action be continued, without more, against the successor in office, inasmuch as that officer should certainly be afforded an opportunity to determine whether the act sought from his predecessor should be performed. The new official might be disposed to perform the act, without litigation, even though the former official refused to do so. See 31 Cong. Rec. 3866. While it is true that a writ of mandamus, and its equivalent, the mandatory injunction,[6] are sued out against the officers in their official capacity, the actions are personal in nature to the extent that the successors are not privy to their predecessors' conduct, and may not therefore be brought into the action. *Warner-Valley Stock Co.* v. *Smith,* 165 U. S. 28, 32; *Allen* v. *Regents,* 304 U. S. 439; *Lyman* v. *Flood*

[6] At least as far as abatement is concerned, there can be no doubt that the writ of mandamus is no different from a mandatory injunction and is governed by like considerations. *Warner-Valley Stock Co.* v. *Smith,* 165 U.S. 28, 33; *Miguel* v. *McCarl,* 291 U.S. 442, 452. That the difference between the two forms of action is little more than verbal is demonstrated by the instant case. The complaint was filed as a "petition in the nature of mandamus." The district court, however, by the addition of such words as "enjoined" and "restrained" granted a judgment in the form of a mandatory injunction (R. 39, 40).

Prevention Association v. *City of Topeka*, 152 Kans. 484; cf. *Thomas B. Bishop Co.* v. *Santa Barbara County*, 96 F. 2d 198 (C.A. 9), certiorari denied, 305 U. S. 623.[7] This lack of authority to bring the new officer into the action was not remedied by his willingness to have the action continue against him. *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600, 605. Thus, it was necessary at common law to abate the action and dismiss the proceeding against the officer who had resigned even where his successor was desirous of having the suit continued against him.

The need and desirability of a statute which would prevent abatement in these situations by allowing the action to be continued against the successor officer was suggested to Congress by this Court on March 21, 1898, in the *Butterworth* case, 169 U. S. 600, 605. Soon thereafter, H. R. 6901, entitled "a bill to prevent the abatement of certain actions," was introduced in the 2d Session of the

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[7] Furthermore, as far as appellate proceedings were concerned, another difficulty stood in the way of directing substitution of the successor. The power to direct a substitution and require the successor "to become a party to the suit, would be an exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, not that of his predecessor." *United States* v. *Boutwell*, 17 Wall. 604, 609. But this Court, apart from the specific exceptions provided in Article III, Section 2, of the Constitution, has no original jurisdiction. Nor did any statute confer original jurisdiction on the courts of appeals. See 28 U.S.C. 1291, 1292.

55th Congress, 31 Cong. Rec. 779. Discussion of the bill, in both the Senate and House, remove all doubt that the bill was designed to meet the need expressed in the *Butterworth case*. 31 Cong. Rec. 3866; 32 Cong. Rec. 492. Indeed, the Report of the House Committee on the Judiciary, in reporting out the bill favorably, is devoted chiefly to a discussion of that case. H. Rep. No. 960, 55th Cong., 2d Sess.

In its original form, H. R. 6901 provided that "no action" by or against a federal official "shall abate" because of his death or resignation, and authorized substitution of the successor within six months. 31 Cong. Rec. 3865. This was the form in which it was passed by the House. 31 Cong. Rec. 3866. In the Senate, the provision that "no action shall abate" was deleted and, in its stead, language allowing the actions to "be revived" against the successor was proposed. The Senate also extended the six-month period to twelve. 32 Cong. Rec. 493. The House refused to concur in the Senate amendments. 32 Cong. Rec. 727. After conference, the twelve-month change was accepted, but the provision that "no * * * action * * * shall abate" was restored, and the bill was enacted in that form as the Act of February, 1899, 30 Stat. 822.

Its language remained unchanged until revised by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941), the statutory provision involved in the instant case. The bill, which became the Judiciary Act of 1925, was prepared and approved

by the then Justices of this Court. H. R. 8206 and S. 2060, 68th Cong., 2d Sess.; see 66 Cong. Rec. 2755, 2877; H. Rep. No. 1075, 68th Cong., 2d Sess., pp. 2, 8. Since its chief purpose was to enlarge this Court's discretionary or certiorari jurisdiction, and thereby lessen the number of unimportant cases which had consumed the Court's time, the debates, as well as recommended changes, were directed to that aspect of the bill. 66 Cong. Rec. 2876-2880; 2752-2758; 2916-2926. No changes were made, however, with respect to Section 11. That section of the bill, passed in the form in which it was originally prepared and approved by the Justices of this Court, differs substantially from the text of the 1899 Act which it replaced. It is to those differences we now turn.

B. The Language of Section 11.

Of chief importance here is Section 11's elimination of the heart of the 1899 Act, that is the provision that "no * * * action * * * shall abate." Instead of the imperative command that actions shall not abate, which the House successfully insisted upon in the former Act despite Senate opposition, Section 11 merely authorizes the continuance of cases against the successor officer "if within six months after [the former officer's] death or separation * * * it be satisfactorily shown to the court that there is a substantial need * * *" for doing so. Section 11, *supra*, p. 3. Whereas the 1899 Act prevented pending litigation from abating despite the lack of timely substitution, the language of the

1925 Act specifically made survival dependent on timely substitution.

An equally important restriction, not contained in the 1899 Act, was imposed by paragraph (c) of Section 11. It added a new provision requiring that notice of the application for substitution be given to the "party or officer" to be affected by the proposed substitution, and according him "an opportunity to present any objection which he may have." Section 11(c), *supra*, p. 3.[8] This requirement that the new officer be notified of the application for substitution necessarily presupposes that the party who had instituted suit against his predecessor has the duty of making that application. Likewise, giving the new officer the opportunity to object to the proposed substitution can only mean that the burden rests with the private party who brings the suit, and not with the public officer defendant, to obtain the substitution order. No other reading of Section 11(c) makes sense.

Also significant in connection with the additional limitations imposed by Section 11 is the fact that it shortened to six months, the former full year period allowed for substitution by the 1899 Act. Taken together, these changes and restrictions con-

[8] Under the 1899 Act, a showing to the court of the "necessity for the survival" of the action "to obtain a settlement of the questions involved" was sufficient to warrant the order of substitution.

stitute a clear direction that an action will abate unless the plaintiff fully complies with the provision for substitution of a successor public officer after the resignation of his predecessor.

C. The Rulings of This Court Show That Abatement of the Instant Action Could Have Been Avoided Only by Compliance With Section 11.

The decisions of this Court construing the 1899 and 1925 Acts, which note the different results dictated by each in the event of failure to effect timely substitution, show that the court below properly vacated the judgment of the district court.

LeCrone v. *McAdoo,* 253 U.S. 217, was the first case which squarely presented to this Court the problem of the effect of a failure to substitute within the twelve-month period allowed by the 1899 Act.[9] In that case, suit was originally instituted against McAdoo, as Secretary of the Treasury. After the trial court's judgment was affirmed by the court of appeals, this Court pointed out that McAdoo had resigned and that his successor had not been substituted within twelve months. 253 U.S. 217, 219. However, because of the clear declaration in the 1899 Act that "no * * * action * * * shall abate," the case was not remanded with instructions to dismiss the action as abated. Instead, the judgments of the trial court and the

[9] *Murphy* v. *Utter,* 186 U. S. 95, decided in 1902, mentions the 1899 Act, but does not discuss its effect.

court of appeals were left intact, and the writ of error merely dismissed. The 1899 Act was similarly applied in *Payne* v. *Industrial Board of Illinois*, 258 U.S. 613, in *United States ex rel. Wattis* v. *Lane*, 255 U.S. 566, and in *Payne* v. *Stevens*, 260 U.S. 705. In each case the failure to effect a timely substitution, while requiring a dismissal of the writ of error, did not, because of the peremptory command of the statute that the proceeding should not abate, require any abrogation of the judgments of the lower courts on the ground that the action had abated.

Exactly opposite results, however, were compelled by Section 11 of the 1925 Act. Unlike the 1899 Act, Section 11, as has been noted, contained no provision that actions shall not abate. Consequently, this Court, in applying Section 11 where there had been a failure to move for substitution within the six-month period allowed by that section, "vacate[d] the judgments entered in the District Court and in the Circuit Court of Appeals and remand[ed] the cause to the District Court with a direction to dismiss the cause as abated." *United States ex rel. Claussen* v. *Curran*, 276 U.S. 590, 591; *Matheus* v. *United States ex rel. Cunningham*, 282 U.S. 802. Accord: *United States ex rel. Trinler* v. *Carusi*, 168 F. 2d 1014 (C. A. 3), where the court of appeals vacated its own judgment as well as that of the district court and remanded the case to the district court. The

Claussen and *Trinler* cases were held to have abated despite the Government's express statement of its willingness to waive the objection if that were possible. There being no express command in Section 11 that the action shall not abate, it is clear that the entire proceeding abates upon the expiration of the six-month statutory period unless a proper substitution has been made for the public officer who has vacated his office.

These cases and the difference in results caused by failure to comply with each of the substitution statutes have only recently been reconsidered by this Court. In *Defense Supplies Corp.* v. *Lawrence Co.*, which involved a statute having "substantially the same" language as that of the 1899 Act, this Court emphasized (336 U.S. 631, 637-638):

> * * * The statutory language construed in the *LeCrone* and *Payne* cases [*i. e.*, under the 1899 Act] was substantially the same as that under scrutiny now, and the court held only that the actions were "at an end" in this court after the year given for substitution had expired—that after that year, we had no jurisdiction to review the merits. The court did not suggest that the courts below had entered their judgments improperly. It simply dismissed the writs of error. But in 1925 the statute was amended. The command, "no action shall abate," was omitted; the new provision made it unmistakably clear that the validity of the judgment was conditional upon substitution. And when called upon to inter-

pret the new statute, we went further than we had in *Payne* and *LeCrone*. We vacated the judgments below, and remanded to the District Court with a direction to dismiss the cause as abated. *United States ex rel. Claussen* v. *Curran, supra.*

Since the provisions of Section 11 of the 1925 Act control the instant case, there is no doubt that the court below, in vacating the judgment of the district court and remanding the case to that court with directions to dismiss the complaint as abated did precisely what this Court, in the *Lawrence, Claussen,* and *Matheus* cases, said must be done under Section 11.

This firmly established rule, requiring abatement and dismissal where there has been a failure to effect timely substitution, is not seriously challenged by petitioner. Instead, she seeks to avoid the impact of the rule by contending (1) that Section 11 does not apply to a judgment in mandamus entered against a public officer prior to his death or resignation, (2) that Section 11 is inapplicable to the instant case because no valid appeal was taken from the district court's judgment and that there was, therefore, no case pending in any court at any time after Rear Admiral Buck resigned, and (3) if Section 11 is applicable to the case at bar, her failure to comply therewith is justified "under principles of estoppel."

1. (a) Petitioner's contention that Section 11 does not apply in the instant case is based on the

assumption that no judgment entered against a public officer defendant prior to his death or resignation abated at common law. From this premise, petitioner argues that Section 11 does not affect the judgment entered in the instant case because Congress, in enacting Section 11, intended only to relieve against the inequities of the common law, and did not intend that the section would cause the abatement of any proceeding that would not have abated at common law. Petitioner's assumption that the judgment would not have abated at common law is erroneous. The case of *Iron Gate Bank* v. *Brady*, 184 U.S. 665, cited by petitioner, does not support the contention that a judgment in mandamus did not abate at common law upon the death or resignation of the public officer defendant.[10] That case merely held that a tort action brought against a collector of internal revenue abated upon the collector's death. The opinion in that case refers to *Patton* v. *Brady, Executrix*, 184 U.S. 608, wherein it was held that an action in assumpsit brought against the same collector to recover an erroneously collected tax, did not abate upon his death.

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[10] Petitioner also relies upon general statements in Corpus Juris to the effect that a judgment does not abate at common law, citing 1 C. J. [pp. 169-170], Sections 288-289, notes 65, 66, and 71, and 1 C. J. S. [pp. 172, 174], Sections 124 and 127 (Br. pp. 7-8). None of the cases collected under these general statements hold that a judgment granting a writ of mandamus against a public officer did not abate at common law upon his death or resignation.

Suits in assumpsit brought against collectors of the revenue are plainly distinguishable from the case at bar. They are maintainable only where a tax has been erroneously collected over the protest of the taxpayer. In those cases, the revenue officer is personally liable in his own property for any judgment entered, and the judgment may be enforced against his estate. Consequently, such actions did not abate at common law, and since judgments entered therein were collectible from the personal estate of the defendant there was no reason to abate such judgments upon his death or resignation. The nature and effect of such actions are clearly shown by the decisions of this Court. *Patton* v. *Brady, Executrix, supra; Sage* v. *United States,* 250 U.S. 33; *Lowe Bros. Co.* v. *United States,* 304 U.S. 302; *Smietanka* v. *Indiana Steel Co.,* 57 U.S. 1; *Union Trust Co.* v. *Wardell,* 258 U.S. 537.

Actions for mandamus, however, seek only a coercive remedy against the public officer defendant. He is not answerable in his own estate for any payment which the action seeks, but is ordered by the court to perform an act which may or may not require the payment of money. If he disobeys the order he may be coerced by the court to comply with it, but he is not liable in his estate for the judgment, as is the defendant in an action in assumpsit. In the circumstances, the court can compel compliance with its order only so long as the

public officer defendant is in office and able to perform the act which the court directs shall be performed. The writ of mandamus does not reach the office, but is personal to the defendant. Since the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. It necessarily follows that upon the death or retirement from office of the defendant, the writ must abate. *United States* v. *Boutwell,* 17 Wall. 604, 607-608; *United States ex rel. Bernardin* v. *Butterworth,* 169 U.S. 600, 602; *Caledonian Coal Co.* v. *Baker,* 196 U.S. 432, 440.

(b) Petitioner asserts that none of the cases in which abatement has been ruled necessary, "involve a judgment entered *against* an officer of the Government prior to his death or resignation from office" (Br. p. 7). Even if this statement were entirely correct, it would mean only that the courts have not had occasion to apply the rationale of the abatement rule in cases where coercive judgments have been entered against public officers under those circumstances, for we find no decisions holding that such judgments do not abate. Actually, however, this Court has abated cases in which coercive judgments have been entered prior to the death or resignation of the public officer.

Thus, in *United States ex rel. Long* v. *Lochren,* 164 U.S. 701, a judgment in mandamus against the Commissioner of Pensions had been entered by the trial court, and this Court dismissed the writ of

error[11] on the authority of the *Boutwell* case, *supra*, wherein it had held that upon the death or retirement of a public officer defendant the writ [of mandamus] must abate. And in *Matheus* v. *United States ex rel. Cunningham*, 282 U.S. 802, a habeas corpus proceeding, wherein the court of appeals had reversed the trial court's dismissal of the writ and had ordered that judgment be entered in favor of the relator, this Court held that the entire proceeding had abated and directed that the cause be remanded to the district court with directions to dismiss the proceeding as abated.[12]

As we have shown above, the resignation of a public officer defendant requires abatement of the action because his resignation has rendered him

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[11] In that case the Solicitor General, representing the Commissioner of Pensions, did not request that this Court order the action dismissed *ab initio*. See Motion to Dismiss and Brief in support thereof filed by the Solicitor General in the *Lochren* case, No. 333, October Term, 1896. Since the trial court's judgment against the public officer had been reversed by the court of appeals, no purpose would have been served by such a request. Moreover, there apparently was, at that time, some doubt whether this Court had jurisdiction to order the entire proceeding dismissed (See also *Pullman Co.* v. *Croom*, 231 U. S. 571, 577), as it did later in *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, and *Matheus* v. *United States ex rel. Cunningham*, 282 U. S. 802, after Section 11 had been enacted. See 28 U. S. C. 2106, which clearly authorizes such action.

[12] See also *United States ex rel. Trinler* v. *Carusi*, 168 F. 2d 1014 (C. A. 3), wherein the court of appeals, after the resignation of the defendant, vacated its own decree against the public officer, and remanded the case to the district court with directions to dismiss the proceeding as having abated.

powerless to perform the official act demanded of him. Obviously, the reason for the abatement is as forceful where the resignation occurs after the entry of the judgment as where it takes place prior to its entry, and whether the judgment was adverse to or in favor of the official. In both situations the determinative factor is that the officer's resignation renders him powerless to perform further official acts, and the court is necessarily without power to compel him to perform acts of that character.

In reality, the reason behind the abatement is that the cause has become moot, since after the resignation, in the absence of a proper substitution, the court is without power to enter a judgment or to enforce one that has been entered. In short, the nub of the entire matter is that there is no longer any subject matter on which the court can act. And this is true whether or not a judgment has been entered against the officer. Thus, in this case, after Rear Admiral Buck's retirement, he could not, as Paymaster General of the Navy, pay the amount demanded.[13] Consequently, upon the retirement of Rear Admiral Buck, the case at bar became moot, and the entire action, including the judgment entered by the trial court, abated upon the expiration of the six-month statutory period for substitution. In the circum-

[13] The complaint makes no claim against him in his personal capacity.

stances, the court below was clearly correct in directing that the judgment be vacated and the entire proceeding be dismissed. This Court has long followed that procedure in moot cases. See *Brownlow* v. *Schwartz,* 261 U.S. 216; *United States* v. *Hamburg-American Co.,* 239 U.S. 466, 475; *United States* v. *American-Asiatic S. S. Co.,* 242 U.S. 537; *Berry* v. *Davis,* 242 U.S. 468, 470; *Board of Public Utility Commissioners* v. *Compania General,* 249 U.S. 425; *Commercial Cable Co.* v. *Burleson,* 250 U.S. 360; *Heitmuller* v. *Stokes,* 256 U.S. 359; *New Orleans Flour Inspectors* v. *Glover,* 160 U.S. 170 and 161 U.S. 101; *United States* v. *Schooner Peggy,* 1 Cranch 103; *Retail Food Clerks and Managers Union* v. *Union Premier Food Stores,* 308 U.S. 526; *Woodring, Secretary of War, et al.* v. *Clarksburg-Columbus Short Route Bridge Co.,* 302 U.S. 658; *Leader et al.* v. *Apex Hosiery Co.,* 302 U.S. 656; *Bracken* v. *Securities and Exchange Comm'n,* 299 U.S. 504. The same procedure has been followed in criminal cases where the defendants have died after judgment and pending appellate proceedings. *List* v. *Pennsylvania,* 131 U.S. 396; *Menken* v. *Atlanta,* 131 U.S. 405.[14]

2. Another contention advanced by petitioner is that Section 11, which by its terms covers "pend-

[14] See also *Metzger* v. *O'Donoghue,* 288 Fed. 461, wherein the Court of Appeals for the District of Columbia followed that procedure in a disbarment proceeding after the disbarred attorney had died.

ing" actions, is inapplicable to the instant case, her assumption being that the action was merged into the judgment from which no valid appeal was taken,[15] and that the action "was not pending either in the District Court or in the Court of Appeals" at any time after Rear Admiral Buck's resignation (Br. 14-16). The entry of a trial court judgment does not mean that the case is no longer pending. *Wegman* v. *Childs,* 41 N. Y. 159. See *Mitchell & Rammelsburg Furniture Co.* v. *Sampson,* 40 Fed. 805 (C.C.N.D. Fla.); *Ulshafer* v. *Stewart,* 71 Pa. 170; *Chapin* v. *James,* 11 R. I. 86; *Sweetser* v. *Fox,* 43 Utah 40. And, for the purposes of Section 11, it is settled that a "cause is still pending until judgment is satisfied." *Becker Steel Co. of America* v. *Hicks,* 66 F. 2d 497, 499 (C. A. 2), certiorari denied, 290 U. S. 667. On no other basis could this Court have applied the substitution requirements of Section 11 to the

[15] Petitioner's suggestion that Rear Admiral Buck's resignation does not stand in the way of holding him *personally* liable for the amount of the death gratuity (Br. p. 8), is plainly inconsistent with her contention that the judgment was of no concern to him and that he had no right to take an appeal. The judgment, of course, directed him to perform the official duty of paying the death gratuity. Obviously, it was not intended that he should pay the gratuity from his personal funds, for he had no personal liability to petitioner, nor was any alleged. Respondent was, however, subject to the coercive authority of the court, and, in that respect, he had a personal interest in the judgment sufficient to warrant his taking the appeal, at least until the expiration of the six-month period permitted by Section 11, *supra*, p. 3, for substituting his successor.

Claussen and *Matheus* cases, *supra*, p. 24, in which the judgments were entered by the district courts far in advance of the resignation of the public officials involved. Furthermore, limiting the word "pending", as suggested by petitioner, would conflict with the reason underlying the rule of abatement. Satisfaction of judgment against a public officer in his official capacity is, of course, conditional upon that officer's availability to perform the official act required by the judgment. If he resigns before complying with the judgment, he no longer can comply with it, and the need for substituting the new incumbent who can comply, consequently arises.

Petitioner's contention that no valid appeal was taken from the judgment of the trial court because Real Admiral Buck's retirement preceded the taking of the appeal, rests largely on the decision of this Court in *Davis* v. *Preston*, 280 U. S. 406. In that case, Davis was the statutory agent of the United States for the purpose of the suit. While so acting, a money judgment was rendered against him in that capacity. After he had ceased to be agent, he filed a petition for a writ of certiorari in this Court, which was granted. This Court held that after he had ceased to be agent, the judgment was of no concern to him, and that he had no authority to seek review by this Court. That decision is plainly inapposite. Since Davis was sued in the capacity of agent of the United States, the suit reached the office, not the individual, and authority

to act had passed to his successor, who had not been made a party within the period in which review could be sought. When Davis ceased to be agent, he, like any other agent, lost all authority to act for his principal. Consequently, he had no authority to seek review of the case when he was no longer agent of the United States for the purpose of the suit.

If the case at bar is not moot it must be because Rear Admiral Buck was sued in his personal capacity in a coercive action which did not reach the office. If this is so, it obviously was proper for him to seek review during the period provided therefor, his successor not having been substituted during that period. He would then have had a personal interest in the case, since he was subject to the coercion of the trial court, and his failure to comply with the judgment might, in the absence of an appeal, have subjected him to contempt process. It follows that the judgment was of serious concern to Rear Admiral Buck and he therefore had ample authority to take the appeal. Consequently, the *Davis* decision does not preclude him from seeking review of the judgment. We submit that there was an action pending in the court below within the meaning of Section 11, and that this contention of petitioner is without merit.

3. Equally lacking in merit is petitioner's contention that principles of estoppel justify her failure to move for substitution within the statu-

tory six-month period. This contention is based on alleged wilful deception. Petitioner states (Br. 17) that on March 18, 1948, after he had ceased to be Paymaster General, "Rear Admiral Buck purported to note and subsequently perfect an appeal as Paymaster General of the Navy and thereby *wilfully misled* the Courts and Madeleine Ursula Snyder to believe that he continued to hold the office of Paymaster" [italics supplied], and that on March 18, 1949, "Rear Admiral Buck disclosed the deception he had successfully carried out for one year."

We submit that it is manifestly unreasonable to attribute to Rear Admiral Buck or to the Government attorneys who handled the case any wilful intention to mislead or deceive the court or the petitioner at the time the appeal was taken in Rear Admiral Buck's name. It is, of course, true that if the federal attorney who was in charge of this case during the six-month period in which substitution was allowable and in which the appeal was taken had been advised of the change in office of the Paymaster General, he undoubtedly would have then brought the change to the attention of the lower courts. The fact is that through inadvertence he was not so advised. The failure of a federal attorney to learn of and, consequently, to suggest to the court the resignation of a public officer within six months after the happening of the event is, in view of the magnitude of government

litigation, frequently inevitable. That failure is, however, of no legal significance, for it can in no way be deemed to relieve a claimant, who seeks to compel a public officer to act, of the statutory requirements for substitution imposed *on that claimant* by Section 11(c). See *supra*, p. 22. The least that can be expected of such a claimant, in view of the statutory requirements, is that he will be sufficiently interested in his case, up until the time any judgment he recovers is satisfied, to make an inquiry once every six months as to the name of the present incumbent of the public office. Here, the opportunity to make such inquiry was as fully available to petitioner as to the government lawyers assigned to the case, a fact which in itself prevents the creation of an estoppel.

But, the mere fact that petitioner did not know that respondent had retired is insufficient, especially where, as here, the exercise of reasonable diligence would have apprised her of the change in office. Even before the six-month period had begun to run, the Congressional Record showed that Rear Admiral Foster's nomination to the office of Paymaster General had been confirmed by the Senate. 94 Cong. Rec. 1410, 1411.

Moreover, we are at a loss to understand what benefit petitioner would derive from the application of an estoppel in this case. Respondent no longer occupies the office of Paymaster General of the Navy, and it is, therefore, impossible for him to perform the duty which the judgment of the

trial court commands him to perform. Petitioner suggests that respondent may be held personally liable for the judgment, but that suggestion is entirely inconsistent with her further contention that he had no right to take the appeal. In any event, the suggestion that respondent is personally liable to petitioner is patently without merit.

D. *Abatement Does Not Leave Petitioner Remediless.*

It is important to note that affirmance of the determination that the cause has abated does not leave petitioner remediless. Abatement "defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way." Bouvier's Law Dictionary, Rawle's Third Revision, p. 7. Here, since the six-year limitation period under the Tucker Act [16] will not expire before 1952, petitioner is in no way barred from instituting a new action. Such an action, of course,

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[16] The petition filed in the district court in this case specifically invoked that court's jurisdiction under the Act of March 3, 1887 (*i.e.*, the Tucker Act). It is well-settled that a suit for the allowance provided by the death gratuity statute will lie in the Court of Claims or in the federal district courts under the Tucker Act. *Campbell* v. *United States*, 80 C. Cls. 836; *Hill* v. *United States*, 68 C. Cls. 740; *Maxwell* v. *United States*, 68 C.Cls. 727; *Thomson* v. *United States*, 58 C. Cls. 207; *Phillips* v. *United States*, 49 C. Cls. 703. Since the Navy Department denied petitioner's death gratuity claim on August 23, 1946 (R. 25), the six-year period allowed by the Tucker Act for the bringing of suit will not expire until August 22, 1952. 28 U.S.C. 1346(a) and 2401.

may prove to be no more meritorious than was her suit to recover the proceeds of a National Service Life Insurance policy. *United States* v. *Snyder*, 177 F. 2d 44 (C.A. D.C.). That fact, however, does not deprive her of the opportunity to litigate any issues not already decided.

E. *Should This Court Reverse The Decision Of The Court Below, The Remand Should Direct That The Case Be Considered On Its Merits*

If this Court should hold that the case abated, of course, affirmance is proper. If it should hold to the contrary, it is plain that the case should go back to the court of appeals for a decision on the merits.

Apparently recognizing the tenuous nature of her claim on the merits, and the likelihood of a ruling by the court below on remand, that the district court erred in awarding her a judgment on the merits, petitioner seeks refuge in the contention that this Court has no power to order a remand but only to order dismissal of the appeal, thus letting the judgment of the district court stand. The argument advanced comes to this: An appeal was noted on March 18, 1948, in the name of Rear Admiral Buck, from the district court judgment against him as Paymaster General. Buck was not in office on that date, having been succeeded on March 1 by Rear Admiral Foster. The latter was not substituted in the case and no

appeal was taken in his name within the 60-day period allowed by 28 U. S. C. 2107 for appeal to the court of appeals. These circumstances, petitioner urges, mean that neither Buck nor Foster took valid appeals within the 60-day period; that the court of appeals cannot therefore pass on the merits, and that this Court cannot remand the case for that purpose. By this attempt to deny the Government its right to appellate review, petitioner hopes to reap the benefits of a district court judgment which, had it been reviewed on the merits, would have been reversed.[17]

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[17] Adoption of petitioner's basic contention that an appeal from a district court judgment, to be valid, must be taken in the name of the *new* incumbent within the 60-day period allowed by 28 U. S. C. 2107, might seriously prejudice and inconvenience the Government and private litigants. It may be well to note a few of the possibilities: (1) If Buck instead of resigning on Maren 1, 1948, had resigned on March 28, petitioner's argument would require that a motion for substitution be made within a one-day period, that is, no later than March 29, 1948 (the end of the 60-day period for appealing from a judgment entered on January 29, 1948), and that the appeal be noted in the name of Rear Admiral Foster. This, of course, would in effect repudiate the 6-month period allowed now for substitution under Rule 25(d), and allowed formerly under Section 11 of the 1925 Act. In view of the magnitude of Government litigation, the one-day period is frequently inadequate even for the purpose of apprising the appropriate United States Attorney of the change in office. (2) Or, if Buck had resigned immediately after judgment was entered against him, and no new Paymaster General had been appointed and confirmed by the Senate until March 30, 1948, it is obvious that, under the view taken by petitioner, no Paymaster General would have been empowered within the 60-day period to take an appeal, and the Government's right

Petitioner does not suggest that this argument is founded on principle or reason. Instead, exclusive reliance is placed on this Court's decision in *Davis* v. *Preston*, 280 U. S. 406,[18] without any attempt being made to analyze the basis of that decision. As we have shown above, *supra*, pp. 34-35, that decision furnishes no support for petitioner's contention that no valid appeal was taken in this case, and, as we have further shown, respondent had a sufficient interest in the judgment to warrant his taking an appeal, *supra*, p. 35. The appeal being valid, the court below would unquestionably have had jurisdiction to consider the merits of the appeal had a timely substitution been made after the appeal was taken. It follows, of course, that if the decision of the court below abating the case is reversible, that court would, on remand, still have jurisdiction to consider the merits of the controversy.

If the judgment of the trial court should not have been vacated by the court below, it must be because that judgment has some value to petitioner, in which event there is necessarily a cor-

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to an appeal on the merits of the case would have been completely frustrated by the fortuitous and frequently necessary delay in filling the public office. (3) Similarly, if in the situation just described, a private litigant found it necessary to take an appeal, his right of appeal would also have been effectively destroyed.

[18] Petitioner also cites, without discussion, *Nudelman* v. *Globe Varnish Co.*, 312 U. S. 690, a *per curiam* order which simply cites the *Preston* case.

responding liability on respondent, for the judgment is personal to him and there are no other parties. If respondent is now liable to pay the judgment despite the abatement, he unquestionably has had a right at all times since its entry to defend himself against it. Petitioner's contention would deprive him of that right but would still call upon him to pay the judgment out of his personal funds.[19] The *Davis* case came to no such unreasonable conclusion, for Davis, who had ceased to be agent, was held not to be liable for the judgment. Adoption of petitioner's contention would not only be improper but would produce an unconscionable result, either of which is unquestionably a sufficient reason for its rejection.

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[19] Petitioner would have this Court direct the court below to dismiss the appeal and leave the judgment intact, in order that an action may be brought thereon in the district court (Br. 21), as was done by this Court in *Defense Supplies Corp.* v. *Lawrence Co.*, 336 U. S. 631. That case involved a money judgment recovered by Defense Supplies Corporation, a Government corporation. After the judgment was entered the corporation was dissolved and its assets were transferred to Reconstruction Finance Corporation, which had not been made a party by substitution. This Court held that the judgment recovered by the corporation did not abate upon the corporation's dissolution, and that in the circumstances of that case the judgment might be revived by the successor in interest. That case was governed by a special statute which expressly provided that the action should not abate. Consequently, the decision of this Court in that case cannot properly be taken as authority to revive a coercive judgment against a public officer after he has ceased to occupy the office, or against a succeeding officer who is not a party to the suit.

In the circumstances, if the judgment below is reversed, the case should be remanded to the court below to decide the appeal on the merits. Such remand is authorized by 28 U. S. C. 2106, and would afford both parties to the suit fair treatment and adequate protection. See, *e. g.*, *Jameson* v. *Railway Co.*, 111 Kans. 670, 672.

II

28 U. S. C. § 2105 may preclude reversal of the ruling of the court below

For the purpose of the foregoing discussion in Point I, we have assumed that this Court has jurisdiction to reverse the judgment of the court below should it consider that there was error in that court's ruling on the question of abatement. A serious question as to whether this Court has jurisdiction is raised by 28 U.S.C. § 2105, which provides:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

Unless the ruling in abatement by the court below can be said to "involve jurisdiction," § 2105 would seem to preclude reversal of the decision below.

What rulings in abatement can be said to involve jurisdiction is not clear in the absence of any authoritative pronouncement. It can be said that the lack of a necessary party—or indeed of any party—by reason of the retirement of a de-

fendant government official, deprives the court of jurisdiction over the case, so that the abatement for failure to substitute the official's successor may be treated as not subject to § 2105. But if petitioner is correct in contending that the judgment of the district court can stand despite the failure to substitute, the ruling below would not involve jurisdiction. and reversal by this Court would be barred.

When the Government sought review of a decision that a case had abated because of failure to substitute a new government official within six months, the Court of Appeals for the Seventh Circuit held that § 2105 applied, and that the order was not reviewable on appeal. *Bowles* v. *Wilke*, 175 F. 2d 35 (C. A. 7), certiorari denied, 338 U.S. 861.[20] The Government believes that

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[20] The discussion of the present question by that Court of Appeals reads as follows:

> The sole issue presented to the District Court by defendants' motion to "dismiss or abate" the action was whether the action had abated due to the failure of Bowles' successor to make timely application for substitution. In deciding this issue, we think the court was unquestionably ruling upon a matter in abatement which did not involve jurisdiction. As the Supreme Court said in Fix, Collector of Internal Revenue v. Philadelphia Barge Co., 290 U.S. 530, 54 S. Ct. 270, 271, 78 L. Ed. 481, "Failure to comply with the statute (i.e. failure of a successor collector to make timely application for substitution (Section 780 Title 28 U.S.C.A.) forecloses the particular remedy therein provided; it does not destroy the right." So here, the District Court

case to have been improperly decided; but, if not, it is indistinguishable here. The only difference between the two cases is that in the *Wilke* case, a new action was barred by the statute of limitations, whereas there is no such obstacle to a new proceeding by the present petitioner. The *Wilke* case was thus a stronger one for concluding that the ruling in abatement was jurisdictional.

In other cases, this Court and courts of appeals have reviewed rulings in abatement where there has been a failure to substitute a proper government official. *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U.S. 631; *Fix* v. *Philadelphia Barge Co.*, 290 U.S. 530; *Fleming* v. *Goodwin*, 165 F. 2d 334 (C. A. 8), certiorari denied, 334 U.S. 828; *Northwestern Lumber Co.* v. *United States*, 170 F. 2d 692 (C.A. 10). But in none of these cases was the question of the effect of § 2105 considered or discussed by the court.

As we stated in our petition for certiorari in the *Wilke* case, the apparent purpose of § 2105 was to prevent review of rulings in abatement which were not final, as where a plea in abatement is overruled. Even the Seventh Circuit, in hold-

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destroyed the pending action, but not the cause of action. In holding that the action had abated, the court had to determine first that the provisions of Rule 25(d) applied to Bowles' successor. If the court erred in its conclusion, it committed an error in ruling upon a matter in abatement which we are precluded by statute from reviewing. [175 F. 2d at 38].

ing itself compelled to deny review of final orders in abatement, has pointed to the harshness of the result, and its lack of foundation in reason. *McHie* v. *McHie*, 78 F. 2d 351, 353. The statute, accordingly, should be given a restrictive interpretation in cases in which its effect would be to deprive a litigant of all appellate review. Whether a case in which the litigant is not precluded from instituting another action falls within that category is, however, questionable, even though the order of abatement is final insofar as the particular proceeding is concerned.

Our conclusion from the above analysis is that § 2105 should be narrowly construed, and probably held inapplicable in the instant case on the ground that abatement for failure to substitute in this case can be regarded as jurisdictional, at least for purposes of construing § 2105. But if *Bowles* v. *Wilke* is believed to be good law, § 2105 would apply and this Court would lack jurisdiction to reverse the decision below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed; or if reversed, that it should be remanded to the court below for consideration of the merits.

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